

AMERICAN  
CRIMINAL REPORTS.

A SERIES

6

DESIGNED TO CONTAIN THE

LATEST AND MOST IMPORTANT

CRIMINAL CASES

DETERMINED IN

THE FEDERAL AND STATE COURTS

IN THE UNITED STATES,

AS WELL AS

SELECTED CASES, IMPORTANT TO AMERICAN LAWYERS,

FROM THE

ENGLISH, IRISH, SCOTCH AND CANADIAN LAW REPORTS,

WITH NOTES AND REFERENCES.

---

BY JOHN G. HAWLEY,

LATE PROSECUTING ATTORNEY AT DETROIT.

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VOL. I.

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## TABLE OF CASES.

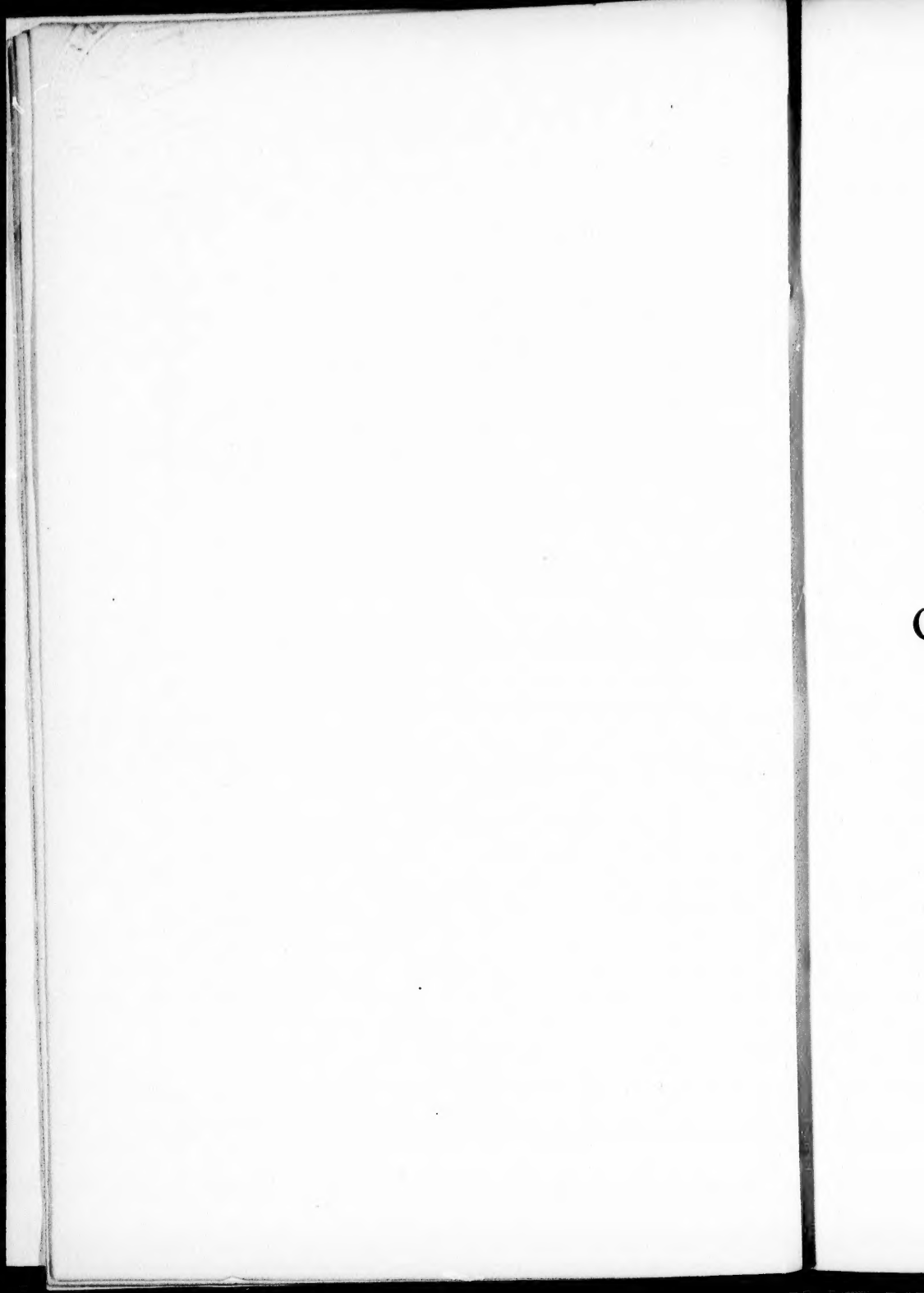
	Page.	Page.
<b>A.</b>		
Alibez, People <i>v.</i> .....	345	Coffman <i>v.</i> Commonwealth..... 293
Amancus, People <i>v.</i> .....	197	Collberg, Commonwealth <i>v.</i> ..... 59
Aylesworth <i>v.</i> People.....	604	Collins, State <i>v.</i> ..... 443
		Conyers <i>v.</i> State..... 237
		Cory <i>v.</i> State..... 166
<b>B.</b>		
Ball <i>v.</i> State.....	477	
Barclay <i>v.</i> State.....	636	<b>D.</b>
Barcus <i>v.</i> State.....	249	Daniel <i>v.</i> State..... 157
Barrie, People <i>v.</i> .....	178	Davis, State <i>v.</i> ..... 398
Baumer <i>v.</i> State.....	354	Davis <i>v.</i> State..... 606
Belmont, Regina <i>v.</i> .....	459	Delany <i>v.</i> State..... 86
Bennett <i>v.</i> State.....	188	Doehring <i>v.</i> State..... 60
Berry <i>v.</i> Commonwealth.....	272	
Biddl, State <i>v.</i> .....	490	<b>E.</b>
Biggerstaff <i>v.</i> Commonwealth.....	497	Earp <i>v.</i> State..... 171
Bishop, State <i>v.</i> .....	594	Effinger <i>v.</i> State..... 486
Boardman, State <i>v.</i> .....	351	Eisenman <i>v.</i> State..... 484
Book, State <i>v.</i> .....	234	Eisenman <i>v.</i> State..... 605
Brown, People <i>v.</i> .....	72	Estes <i>v.</i> State..... 596
Brown <i>v.</i> State.....	487	
Boxley <i>v.</i> Commonwealth.....	655	<b>F.</b>
Brieswick <i>v.</i> Mayor et al. of Brunswick.....	559	Fenn, State <i>v.</i> ..... 378
Brown <i>v.</i> People.....	228	Ferguson <i>v.</i> State..... 582
Bullard <i>v.</i> State.....	577	Foster, State <i>v.</i> ..... 146
Burns <i>v.</i> State.....	324	Foulkes, Queen <i>v.</i> ..... 153
		Frazer <i>v.</i> State..... 315
		Flynn <i>v.</i> State..... 424
<b>C.</b>		
Carter, State <i>v.</i> .....	444	
Carter <i>v.</i> State.....	446	<b>G.</b>
Cassady, State <i>v.</i> .....	567	Galloway <i>v.</i> State..... 437
Cearfoss <i>v.</i> State.....	460	Golden <i>v.</i> State..... 586
Christian, Queen <i>v.</i> .....	157	Goodenow, State <i>v.</i> ..... 42
Christman, People <i>v.</i> .....	70	Graham, State <i>v.</i> ..... 182
City of Bloomington <i>v.</i> Heiland....	600	Grant, Commonwealth <i>v.</i> ..... 500
Clark, People <i>v.</i> .....	660	Graves, State <i>v.</i> ..... 429
Clark, State <i>v.</i> .....	34	Gray, State <i>v.</i> ..... 554
		Greer <i>v.</i> State..... 643

	Page.		Page
Grigg v. People.....	602	Marmont v. State.....	447
Gumble, Queen v. ....	396	Marshall v. State.....	482
		Martin v. State.....	536
<b>H.</b>		Martinez v. State.....	420
Hamilton v. People.....	618	Mayor of Brunswick v. Brieswick..	559
Hawkins, Commonwealth v. ....	65	May, State v.....	420
Heed, State v. ....	502	McCoy v. People.....	71
Heiland, City of Bloomington v. ..	600	McCoy v. State.....	589
Hembree v. State.....	504	McCue v. Commonwealth.....	268
Henderson, State v.....	233	McCulloch v. State.....	318
Hendrix v. State.....	57	McCutcheon v. People.....	471
Hennessy, Regina v.....	403	McDade v. People.....	81
Hensly v. State.....	465	McDonald, State v.....	368
Horbach v. State.....	330	McKay v. State.....	46
Hunkeler, People v.....	507	Meister v. People.....	91
		Middleton v. State.....	194
<b>I.</b>		Middleton v. State.....	422
Isaacs v. State.....	103	Miller v. State.....	230
		Moore v. State.....	613
<b>J.</b>		<b>N</b>	
Jackson, Commonwealth v.....	74	Neely, State v. ....	636
John White, ex parte.....	169	Negus, Queen v.....	150
Jones v. Commonwealth.....	262	Newman v. State.....	173
Jones v. State.....	218	Niles, State v.....	646
Jones v. State.....	510	Nolan v. State.....	532
		Norega, People v.....	436
<b>K.</b>		<b>O.</b>	
Kean v. Commonwealth.....	199	O'Brian v. Commonwealth.....	520
Kellar v. State.....	211	Olmstead, People v.....	301
King v. State.....	426	Ortwein v. Commonwealth.....	297
		Osborn v. State.....	25
<b>L.</b>		<b>P.</b>	
Landringham v. State.....	105	Paulk v. State.....	67
Lark v. State.....	563	Porter v. State.....	232
Lathrope v. State.....	468	Potts, State v.....	363
Lathrope v. State.....	496	Price v. State.....	423
Lavin v. People.....	578	Prince, Regina v.....	1
Le Bur, ex parte.....	241	Prince v. State.....	545
Leiber v. Commonwealth.....	360		
Lightner, People v.....	539	<b>R.</b>	
Line v. State.....	615	Rafferty v. People.....	287
Lynch v. Commonwealth.....	283	Regina v. Belmont.....	457
Lyons v. State.....	28	Regina v. Hennessy.....	403
		Regina, Starr v.....	438
<b>M.</b>		Regina v. Prince.....	1
Madigan, State v.....	542		
Maranda v. State.....	225		

## TABLE OF CASES.

v

	Page.		Page.
Regina v. Smith .....	511	Walker, State v. ....	432
Reich v. State .....	543	Walker v. State .....	362
		Ward v. People .....	565
S.		Waterman v. People .....	225
Saunders v. People ...	346	Waters v. State .....	367
Scanlan, State v. ....	185	Weaver v. People .....	552
Sehorn v. State .....	597	Wellar v. People .....	276
Shirwin v. People .....	650	White, John, Ex parte .....	169
Shivers v. State .....	206	Williams, State v. ....	56
Slattery v. People .....	29	Williams v. State .....	227
Smith, Regina v. ....	511	Williams v. State .....	413
Smith, State v. ....	580	Wilson, People v. ....	107
Smith v. State .....	246	Wilson, People v. ....	358
Stanley, State v. ....	209	Wilson, State v. ....	529
Starr, Regina v. ....	438	Wilson v. Commonwealth .....	612
Stubbs v. State .....	608	Woodward v. State .....	366
Sullivan v. People .....	359	Wray, State v. ....	480
Sylvester v. State .....	350	Wright v. People .....	244
		Wright v. State .....	191
T.			
Titus, Commonwealth v. ....	416	Y.	
Tilton v. State .....	564	Yates v. State .....	434
U.		Z.	
Underwood, State v. ....	251	Zeizer v. State .....	480
Udderzook v. Commonwealth .....	311	Zook v. State .....	240



AMERICAN  
CRIMINAL REPORTS.

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## AMERICAN CRIMINAL REPORTS.

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REG. *vs.* PRINCE.

(2 Cr. Cas., Res., 154.)

ABDUCTION — *Girl under sixteen — Bona fide and reasonable belief that she was older — Mens rea — 24 and 25 Vict., ch. 100, sec. 55.*

The prisoner was convicted under 24 and 25 Vict., ch. 100, sec. 55, of unlawfully taking an unmarried female, under the age of sixteen, out of the possession and against the will of her father. It was proved that the prisoner did take the girl, and that she was under sixteen, but that he *bona fide* believed, and had reasonable ground for believing, that she was over sixteen: *Held* (by Cockburn, C. J., Kelly, C. B., Brownwell, Cleasby, Pollock, and Amphlett, BB., Blackburn, Mellor, Lush, Grove, Quain, Denman, Archibald, Field and Lindley, JJ., Brett, J., dissenting), that the latter fact afforded no defense, and that the prisoner was rightly convicted.

CASE stated by DENMAN, J.

At the assizes for Surrey, held at Kingston-upon-Thames, on the 24th of March last, Henry Prince was tried upon the charge of having unlawfully taken one Annie Phillips, an unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father. The indictment was framed under sec. 55 of 24 and 25 Vict., ch. 100.<sup>1</sup> He was found guilty.

All the facts necessary to support a conviction existed, unless the following facts constituted a defense: The girl, Annie Phillips, though proved by her father to be fourteen years old on the

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<sup>1</sup> By 24 and 25 Vict., ch. 100, sec. 55, "Whosoever shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."



6th of April following, looked very much older than sixteen; and the jury found, upon reasonable evidence, that before the defendant took her away, she had told him that she was eighteen, and that the defendant *bona fide* believed that statement, and that such belief was reasonable.

If the court should be of opinion that under these circumstances a conviction was right, the defendant was to appear for judgment at the next assizes for Surrey; otherwise, the conviction was to be quashed; see *Reg. v. Robins*, C. & K., 546, and *Reg. v. Olfier*, 10 Cox Cr. C., 402.

April 25, the court (Cockburn, C. J., Bramwell and Pollock, BB., Mellor and Brett, JJ.) reserved the case for the consideration of all the judges.

May 29, the case was argued before Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, Pollock and Amphlett, BB., Blackburn, Mellor, Lush, Brett, Grove, Quain, Denman, Archibald, Field and Lindley, JJ.

No counsel appeared for the prisoner.

Lilley, for the prosecution, cited *Attorney General v. Lockwood*, 9 M. & W., 378; *Reg. v. Marsh*, 4 D. & R., 260; *Reg. v. Hopkins*, Car. & M., 254; *Lee v. Simpson*, 3 C. B., 871; 16 L. J. (C. P.), 105; *Reg. v. Robins*, (1); *Reg. v. Kipps*, 4 Cox Cr. C., 167; *Reg. v. Olfier*, (2); *Reg. v. Mycock*, 12 Cox Cr. C., 28; *Reg. v. Booth*, 12 Cox Cr. C., 231.

Cockburn, C. J., referred to *Reg. v. Hibbert*, Law Rep., 1 C. C., 184.

Pollock, B., referred to *Rex v. Lord Gray*, 9 St. Tr., 127.

June 26. The following judgments were delivered:

BRETT, J. In this case, the prisoner was indicted under 24 and 25 Vict., ch. 100, sec. 55, for that he did unlawfully take an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father, and, according to the statements of the case, we are to assume that it was proved on a trial that he did take an unmarried girl out of the possession and against the will of her father, and that when he did so, the girl was under the age of sixteen years. But the jury found that the girl went with the prisoner willingly; that she told the prisoner that she was eighteen years of age; that he believed that she was eighteen years of age, and that he had reasonable

ground for so believing. The question is, whether upon such proof and such findings of the jury, the prisoner ought or ought not, in point of law, to be pronounced guilty of the offense with which he was charged. He, in fact, did each and every thing which is enumerated in the statute as constituting the offense to be punished, if what he did was done unlawfully within the meaning of the statute. If what he did was unlawful within the meaning of the statute, it seems impossible to say that he ought not to be convicted. If what he did was not unlawful within the meaning of the statute, it seems impossible to say that he ought to be convicted. The question, therefore, is, whether the findings of the jury, which are in favor of the prisoner, prevent what he is proved to have done, from being unlawful within the meaning of the statute. It cannot, as it seems to me, properly be assumed that what he did was unlawful within the meaning of the statute, for that is the very question to be determined.

Now, on the one side, it is said that the prisoner is proved to have done every particular thing which is enumerated in the act as constituting the offense to be punished, and that there is no legal justification for what he did, and, therefore, that it must be held, as a matter of law, that what he did was unlawful within the meaning of the statute, and that the statute was therefore satisfied, and the crime completed. On the other side, it is argued that if the facts had been as the prisoner believed them to be, and as by the findings of the jury he might reasonably believe them to be, and was deceived into believing them to be, he would have been guilty of no criminal offense at all, and therefore he had no criminal intent at all, and therefore what he did was not criminally unlawful within the meaning of the criminal statute under which he was indicted.

It has been said that even if the facts had been as the prisoner believed them to be, he would still have been doing a wrongful act. The first point, therefore, to be considered would seem to be; what would have been the legal position of the prisoner, if the facts had been as he believed them to be; that is to say, what is the legal position of a man who without force takes a girl more than sixteen years of age, but less than twenty-one years of age, out of the possession of her father and against his will? The statute, 4 and 5 Phil. & Mary, ch. 8, has been said to recognize the legal right of a father to the possession of an unmarried

daughter up to the age of sixteen. The statute, 12 Car. II, ch. 24, seems to recognize the right of a father to such possession up to the age of twenty-one. Mr. Hargreave, in notes 12 and 15 to Co. Lit., 88 b, seems to deduce a right in the father to possession up to the age of twenty-one from those two statutes, and that such right is to be called in law a right *jure naturæ*. If the father's right be infringed, he may apply for a *habeas corpus*. When the child is produced in obedience to such writ, issued upon the application of a father, if the child be under twenty one, the general rule is, that, "if the child be of an age to exercise a choice, the court leaves it to elect where it will go; if it be not of that age, and a want of discretion would only expose it to dangers or seductions, the court must make an order for its being placed in the proper custody, and that undoubtedly is the custody of the father:" Lord Denman, C. J., in *Rex v. Glenhill*, 4 A. & E., 624; but if the child be a female under sixteen, the court will order it to be handed over to the father, in the absence of certain objections to his custody, even though the child object to return to the father. If the child be between sixteen and twenty-one, and refuse to return to the father, the court, even though the child be a female, gives to the child the election as to the custody in which it will be. "Now, the cases which have been decided on this subject show that although the father is entitled to the custody of his children till they obtain the age of twenty-one, this court will not grant a *habeas corpus* to hand a child which is below that age over to its father, provided that it has attained an age of sufficient discretion to enable it to exercise a wise choice for its interest. The whole question is, what is that age of discretion? We repudiate utterly, as most dangerous, the notion that any intellectual precocity in an individual female child can hasten the period which appears to have been fixed by statute for the arrival of the age of discretion; for that very precocity, if uncontrolled, might very probably lead to her irreparable injury. The legislature has given us a guide, which we may safely follow, in pointing out sixteen as the age up to which the father's right to the custody of his female child is to continue; and short of which such a child has no discretion to consent to leaving him." Cockburn, C. J., in *Reg. v. Howes*, 3 C. & E., 332. But if a man take out of her father's possession without force and with her consent a daughter between sixteen

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and twenty-one, the father would seem to have no legal remedy for such taking. It may be that the father, if present at the taking, might resist such taking, by necessary force, so that to an action for assault by the man, he might plead a justification. But for a mere such taking without seduction, there is no action which the father could maintain. There never was a writ applicable to such a cause of action. The writ of "ravishment of ward" was only to such as had the right to the marriage of the infant, and was therefore only applicable where the infant was an heir to property, whose marriage was therefore valuable to the guardian. See *Ratcliff's Case*, 3 Co. Rep., 37. No such action now exists, and if it did, it would not be applicable to any female child, at all events, not to any who was heir-apparent. Neither can a man who with her consent, and without force, takes a daughter who is more than sixteen years old but less than twenty-one, out of her father's possession or custody, be indicted for such taking. There never has been such an indictment. The statute, 3 Hen. VII, ch. 2, was enacted against "the taking any woman so against her will unlawfully, that is to say, maid, widow, or wife, that such taking, etc., be felony." It was held in *Lady Fullwood's Case*, Cro. Car., 484, that the indictment must further charge that the defendant carried away the woman with intent to marry or defile her. Two things, therefore, were necessary, which are not applicable to the point now under discussion, namely, that the taking should be against the will of the person taken, and that there should be the intent to marry or defile. The statute, 4 and 5 Phil. & Mary, ch. 8, deals with the taking out of or from the possession, custody or government of the father, etc., any maid or woman child, unmarried, being under the age of sixteen years. For a mere unlawful taking, the punishment is imprisonment for two years. For a taking and marriage, five years. And the girl, if she be more than twelve years old, and consents to the marriage, forfeits her inheritance. The statute, 9 Geo. IV, ch. 31, sec. 19, is enacted against the taking of a woman against her will with intent to marry or defile her, etc. The same statute, sec. 20, is as to an unmarried girl being under the age of sixteen years. It follows from this review that if the facts had been as the prisoner, according to the findings of the jury, believed them to be, and had reasonable ground for believing them to be, he would have done no act

which has ever been a criminal offense in England; he would have done no act in respect of which any civil action could have ever been maintained against him; he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl the father could have had any legal remedy.

We have then next to consider the terms of the statute, and what is the meaning in it of the word "unlawfully." "The usual system of framing criminal acts has been to specify each and every act intended to be subject to any punishment;" Criminal Law Consolidation Acts, by Greaves, Introduction, p. xxxvii; and then in some way to declare whether the offense is to be considered as a felony or as a misdemeanor, and then to enact the punishment. It seems obvious that it is the prohibited acts which constitute the offense, and that the phraseology which indicates the class of the offense does not alter or affect the facts, or the necessary proof of those facts, which constitute the offense. There are several usual forms of criminal enactment: "If any one shall with such or such intent do such and such acts, he shall be guilty of felony or misdemeanor, or as the case may be." Whether the offense is declared to be a felony or a misdemeanor depends upon the view of the legislature as to its heinousness. But the class in which it is placed does not alter the proof requisite to support a charge of being guilty of it. Under such a form of enactment, there must be proof that the acts were done, and done with the specified intent. Other forms are: "If any one shall feloniously do such and such acts, he shall be liable to penal servitude," etc.; or, "If any one shall unlawfully do such and such acts, he shall be liable to imprisonment," etc. The first of these forms makes the offense a felony by the use of the word "feloniously;" the second makes the offense a misdemeanor by the use of the word "unlawfully." The words are used to declare the class of the offense. But they denote also a part of that which constitutes the offense. They denote that which is equivalent to, though not the same as, the specific intent mentioned in the first form, to which allusion has been made. Besides denoting the class of the offense, they denote that something more must be proved than merely that the prisoner did the prohibited acts. They do not necessarily show that evidence need, in the first instance, be

given of more than that the prisoner did the prohibited acts; but they do denote that the jury must find, as a matter of ultimate proof, more than that the prisoner did the prohibited acts. What is it that the jury must be satisfied is proved, beyond merely that the person did the prohibited acts? It is suggested that they must be satisfied that the prisoner did the acts with a criminal mind, that there was "*mens rea*." The true meaning of that phrase is to be discussed hereafter. If it be true that this must be proved, the only difference between the second forms and the first form of enactment is, that in the first the intent is specified, but in the second it is left generally as a criminal state of mind. As between the two second forms, the evidence, either direct or inferential, to prove the criminal state of mind, must be the same. The proof of the state of the mind is not altered or affected by the class in which the offense is placed.

Another common form of enactment is, "If any person knowingly, wilfully and maliciously do such or such acts, he shall be guilty of felony," or "if any knowingly and wilfully do such or such acts, he shall be guilty of misdemeanor," or "if any knowingly, wilfully and feloniously do such or such acts, he shall be liable," etc., or "if any knowingly and unlawfully do such and such acts, he shall be liable," etc. The same explanation is to be given of all these forms as between each other as before. They are mere differences in form. And though they be all, or though several of them be in one consolidating statute, they are not to be construed by contrast. "If any question should arise in which any comparison may be instituted between different sections of any one or several of these acts, it must be carefully borne in mind in what manner these acts were framed. None of them was rewritten; on the contrary, each contains enactments taken from different acts passed at different times and with different views, and frequently varying from each other in phraseology; and, for the reasons stated in the introduction, these enactments for the most part stand in these acts with little or no variation in their phraseology, and consequently their differences in that respect will be found generally to remain in these acts. It follows, therefore, from hence, that any argument as to a difference in the intention of the legislature which may be drawn from a difference in the terms of one clause from those in another, will be entitled to no weight in the construction of

such clauses, for that argument can only apply with force where an act is framed from beginning to end with one and the same view, and with the intention of making it thoroughly consistent throughout." Greaves on Criminal Law Consolidation Acts, p. 3. I have said that as between each other the same explanation is to be given of these latter forms of enactment as of the former mentioned in this judgment. But as between these latter and the former forms, there is the introduction in the latter of such words as "knowingly," "wilfully," "maliciously." "Wilfully" is more generally applied when the prohibited acts are in their natural consequences not necessarily or very probably noxious to the public interest, or to individuals, so that an evil mind is not the natural inference or consequence to be drawn from the doing of the acts. The presence of the word requires somewhat more evidence on the part of the prosecution to make out a *prima facie* case, than evidence that the prisoner did the prohibited acts. So as to the word "maliciously," it is usual where the prohibited acts may or may not be such as in themselves import *prima facie* a malicious mind. In the same way the word "knowingly" is used, where the noxious character of the prohibited acts depends upon knowledge in the prisoner of their noxious effect, other than the mere knowledge that he is doing the acts. The presence of the word calls for more evidence on the part of the prosecution. But the absence of the word does not prevent the prisoner from proving to the satisfaction of the jury, that the *mens rea*, to be *prima facie* inferred from his doing the prohibited acts, did not in fact exist. In *Rea v. Marsh*, 2 B. & C., 717, the measure of the effect of the presence in the enactment of the word "knowingly" is explained. The information and conviction were against a carrier for having game in his possession contrary to the statute, 5 Anne, ch. 14, which declares "that any carrier having game in his possession is guilty of an offense, unless it be sent by a qualified person." The only evidence given was, that the defendant was a carrier, and that he had game in his wagon on the road. It was objected that there was no evidence that the defendant knew of the presence of the game, or that the person who sent it was not a qualified person. The judges held that there was sufficient *prima facie* evidence, and that it was not rebutted by the defendant by sufficient proof on his part of the ignorance sug-

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gested on his behalf. The judgments clearly import, that if the defendant could have satisfied the jury of his ignorance, it would have been a defense, though the word "knowingly" was not in the statute. In other words, that its presence or absence in the statute only alters the burden of proof. "Then, as to knowledge, the clause itself says nothing about it. If that had been introduced, evidence to establish knowledge must have been given on the part of the prosecutor; but under this enactment the party charged must show a degree of ignorance sufficient to excuse him. Here there was *prima facie* evidence that the game was in his possession as carrier. Then it lay on the defendant to rebut that evidence:" Bagley, J. "The game was found in his wagon employed in the course of his business as a carrier. That raises a presumption *prima facie* that he knew it, and that is not rebutted by the evidence given on the part of the defendant:" Littledale, J.

From these considerations of the forms of criminal enactments, it would seem that the ultimate proof necessary to authorize a conviction is not altered by the presence or absence of the word knowingly, though by its presence or absence the burden of proof is altered; and it would seem that there must be proof to satisfy a jury ultimately that there was a criminal mind, or *mens rea*, in every offense really charged as a crime. In some enactments, or common law maxims of crime, and therefore in the indictments charging the committal of those crimes, the name of the crime imports that a *mens rea* must be proved, as in murder, burglary, etc. In some the *mens rea* is contained in the specific enactments as to the intent which is made a part of the crime. In some the word "feloniously" is used, and in such cases it has never been doubted but that a felonious mind must ultimately be found by the jury. In enactments in a similar form, but in which the prohibited acts are to be classed as a misdemeanor, the word "unlawfully" is used instead of the word "feloniously." What reason is there why, in like manner, a criminal mind, or *mens rea*, must not ultimately be found by the jury in order to justify a conviction, the distinction always being observed, that in some cases the proof of the committal of the acts may *prima facie*, either by reason of their own nature, or by reason of the form of the statute, import the proof of the *mens rea*? But even in those cases it is open to the prisoner to rebut the *prima facie*



evidence, so that if, in the end, the jury are satisfied that there was no criminal mind, or *mens rea*, there cannot be a conviction in England for that which is by the law considered to be a crime.

There are enactments which by their form seem to constitute the prohibited acts into crime, and yet by virtue of which enactments the defendants charged with the committal of the prohibited acts have been convicted in the absence of the knowledge or intention supposed necessary to constitute a *mens rea*. Such are the cases of trespass in pursuit of game, or of piracy of literary or dramatic works, or of the statutes passed to protect the revenue. But the decisions have been based upon the judicial declaration that the enactments do not constitute the prohibited acts into crime or offenses against the crown, but only prohibit them for the purpose of protecting the individual interest of individual persons, or of the revenue. Thus, in *Lee v. Simpson*, 3 C. B., 871; 15 L. J. (C. P.), 195, in an action for penalties for the representation of a dramatic piece, it was held that it was not necessary to show that the defendant knowingly invaded the plaintiff's right. But the reason of the decision given by Wilde, C. J., 3 C. B., at p. 883 is: "The object of the legislature was to protect authors against the piratical invasion of their rights. In the sense of having committed an offense against the act, of having done a thing that is prohibited, the defendant is an offender. But the plaintiff's rights do not depend upon the innocence or guilt of the defendant." So the decision in *Morden v. Porter*, 7 C. B. (N. S.), 641; 29 L. J. (M. C.), 218, seems to be made to turn upon the view that the statute was passed in order to protect the individual property of the landlord in game reserved to him by his lease against that which is made a statutory trespass against him, although his land is in the occupation of his tenant. There are other cases in which the ground of decision is that specific evidence of knowledge or intention need not be given, because the nature of the prohibited acts is such that, if done, they must draw with them the inference that they were done with the criminal mind or intent, which is a part of every crime. Such is the case of the possession and distribution of obscene books. If a man possesses them, and distributes them, it is a necessary inference that he must have intended that their first effect must be that which is prohibited by statute, and that he cannot protect himself by showing that his ultimate object or

secondary intent was not immoral. *Reg. v. Hicklin*, Law Rep., 3 Q. B., 360. This and similar decisions go rather to show what is *mens rea*, than to show whether there can or cannot be conviction for crime proper, without *mens rea*.

As to the last question, it has become very necessary to examine the authorities. In Blackstone's Commentaries by Stephen, 2d ed., vol. IV, book 6, Of Crimes, p. 98. "And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all, so that, to constitute a crime against human laws, there must be first a vicious will, and secondly an unlawful act consequent upon such vicious will. Now there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding, etc. 2. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all offenses committed by chance or ignorance. Here the will sits neuter, and neither concurs with the act nor disagrees to it." And at p. 105; "Ignorance or mistake is another defect of will, when a man, intending to do a lawful act, does that which is unlawful; for here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an ignorance or mistake in fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake, kills one of his family, this is no criminal action, but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder." In *Fowler v. Padget*, 7 T. R., 509, the jury found that they thought the intent of the plaintiff in going to London was laudable; that he had no intent to defraud or delay his creditors, but that delay did actually happen to some creditors. Lord Kenyon said, "Bankruptcy is considered as a crime, and the bankrupt in the old laws is called an offender; but it is a principle of natural justice and of our laws that *actus non reum facit, nisi mens sit rea*. The intent and the act must both concur to constitute the crime." And again: "I would adopt any construction of the statute that the words will bear, in order to avoid such monstrous consequences as would manifestly ensue from the construction contended for."

In *Hearne v. Garton*, 2 E. & E., 16, 28, L. J. (M. C.), 216, the respondents were charged upon an information, for having sent oil of vitriol by the Great Western Railway, without marking or stating the nature of the goods. By 20 and 21, Vict., ch. 43, sec. 168, "every person who shall send or cause to be sent by the said railway, any oil of vitriol, shall distinctly mark or state the nature of such goods, etc., on pain of forfeiting, etc." By sec. 206, such penalty is recoverable in a summary way before justices, with power to imprison, etc. The respondent had in fact sent oil of vitriol unmarked, but the justices found that there was no guilty knowledge, but, on the contrary, the respondents acted under the full belief that the goods were correctly described, and had previously used all proper diligence to inform themselves of the fact. They refused to convict. It must be observed that in that case, as in the present, the respondents did in fact the prohibited acts, and that in that case, as in this, it was found, as the ultimate proof, that they were deceived into the belief of a different and non-criminal state of facts, and had used all proper diligence. The case is stronger, perhaps, than the present, by reason of the word "unlawfully" being absent from that statute. The court upheld the decision of the magistrates, holding that the statute made the doing of the prohibited acts a crime, and therefore that there must be a criminal mind, which there was not. "As to the latter reason, I think the justices were perfectly right; *actus non reum facit, nisi mens sit rea*. The act with which the respondents were charged is an offense created by statute, and for which the person committing it is liable to a penalty or to imprisonment; not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised on them. I am inclined to think they were civilly liable." Lord Campbell, C. J. "I was inclined to think at first, that the provision was merely protective; but if it created a criminal offense, which I am not prepared to deny, then the mere sending by the respondents, without a guilty knowledge on their part, would not render them criminally liable, although, as they took Nicholas's word for the contents of the parcel, they would be civilly liable." Erle, J.

In *Taylor v. Newman*, 4 B. & S., 89, 32, L. J. (M. C.), 186,

the information was under 24 and 25, Vict., ch. 96, sec. 23. "Who-soever shall unlawfully and wilfully kill, etc., any pigeon, etc." The appellant shot pigeons on his farm belonging to a neighbor. The justices convicted, on the ground that the appellant was not justified by law in killing the pigeons, and, therefore, that the killing was unlawful. In other words they held that the only meaning of "unlawfully" in the statute was "without legal justification." The court set aside the conviction. "I think that the statute was not intended to apply to a case in which there was no guilty mind, and where the act was done by a person under the honest belief that he was exercising a right." Mellor J.

In *Buckmaster v. Reynolds*, 13 C. B. (N. S.), 62, an information was laid for unlawfully, by a certain contrivance, attempting to obstruct or prevent the purposes of an election at a vestry. The evidence was that that defendant did obstruct the election because he forced himself and others into the room before eight o'clock, believing that eight o'clock was passed. The question asked was, whether an intentional obstruction by actual violence is an offense, etc. This question the court answered in the affirmative, so that there, as here, the defendant had done the prohibited acts. But Erle, J., continued: "I accompany this statement (i. e., the answer to the question) by a statement that upon the facts set forth I am unable to see that the magistrate has come to a wrong conclusion. A man cannot be said to be guilty of a delict, unless to some extent his mind goes with the act. Here it seems that the respondent acted in the belief that he had a right to enter the room, and that he had no intention to do a wrongful act."

In *Reg. v. Hibbert*, Law Rep., 1 C. C., 184, the prisoner was indicted under the section now in question. The girl, who lived with her father and mother, left her home in company with another girl to go to a Sunday-school. The prisoner met the two girls and induced them to go to Manchester. At Manchester he took the girl to a public house and there seduced the girl in question, who was under sixteen. The prisoner made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to, and did not believe that she was a girl of the town. The jury found the prisoner guilty, and Lush, J., reserved the case. In the Court of Criminal Appeals, Bovill, C. J., Channell and Pigott, BB., Byles and

Lush, JJ., quashed the conviction. Bovill, C. J.: "In the present case there is no statement of any finding of fact that the prisoner knew, or had reason to believe, that the girl was under the lawful care or charge of her father or mother, or any other person. In the absence of any finding of fact on this point, the conviction cannot be supported." This case was founded on *Reg. v. Green*, 3 F. & F., 274, before Martin, B. The girl was under fourteen, and lived with her father, a fisherman, at South-end. The prisoners saw her in the street, by herself, and induced her to go with them. They took her to a lonely house, and there Green had criminal intercourse with her. Martin, B., directed an acquittal: "There must," he said, "be a taking out of the possession of the father. Here the prisoners picked up the girl in the street, and for anything that appeared, they might not have known that the girl had a father. The girl was not taken out of the possession of any one. The prisoners, no doubt, had done a very immoral act, but the question was, whether they had committed an illegal act. The criminal law ought not to be strained to meet a case which did not come within it. The act of the prisoners was scandalous, but it was not any legal offense." In each of these cases the girl was surely in the legal possession of her father. The fact of her being in the street at the time could not possibly prevent her from being in the legal possession of her father. Everything, therefore, prohibited, was done by the prisoner in fact. But in each case the ignorance of facts was held to prevent the case from being the crime to be punished.

In *Reg. v. Tinkler*, 1 F. & F., 513, in a case under this section, Cockburn, C. J., charged the jury thus: "It was clear the prisoner had no right to act as he had done in taking the child out of Mrs. Barnes' custody. But inasmuch as no improper motive was suggested on the part of the prosecution, it might very well be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise which he alleged he had made to her father, and that he did not suppose he was breaking the laws when he took the child away. This being a criminal prosecution, if the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to an acquittal." The jury found the prisoner not guilty.

In *Reg. v. Sleep*, 8 Cox Cr. C., 472, the prisoner had possession of government stores, some of which were marked with the broad arrow. The jury, in answer to a question whether the prisoner knew that the copper, or any part of it, was marked, answered, "We have not sufficient evidence before us to show that he knew it."

The Court of Criminal Appeal held that the prisoner could not be convicted. Cockburn, C. J.: "*Actus non reum facit, nisi mens sit rea* is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case, and must be imported into this statute, as it was held in *Reg. v. Cohen*, 8 Cox Cr. C., 41; where this conclusion of the law was stated by Hill, J., with his usual clearness and power. It is true that the statute says nothing about knowledge, but this must be imported into the statute." Pollock, C. B., Martin, B., Crompton and Willes, JJ., agreed.

In the case of *Reg. v. Robins*, C. & K., 456, and *Reg. v. Oliver*, 10 Cox Cr. C., 402, there was hardly such evidence as was given in this case, as to the prisoner being deceived as to the age of the girl, and having reasonable ground to believe the deception, and there certainly were no findings by the jury equivalent to the findings in this case.

In *Reg. v. Forbes and Webb*, 10 Cox Cr. C., 362, although the policeman was in plain clothes, the prisoner had strong ground to suspect, if not to believe, that he was a policeman, for the case states that they repeatedly called out to rescue the boy and pitch into the constable.

Upon all the cases, I think it is proved that there can be no conviction for crime in England in the absence of a criminal mind, or *mens rea*.

Then comes the question, what is the true meaning of the phrase? I do not doubt that it exists where the prisoner knowingly does acts which would constitute a crime if the result were as he anticipated, but in which the result may not improbably end by bringing the offense within a more serious class of crime. As if a man strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills, the result makes the crime murder. The prisoner has run the risk. So, if a prisoner do the prohibited acts, without caring to consider what the truth is as

to facts—as if a prisoner were to abduct a girl under sixteen without caring to consider whether she was in truth under sixteen, he runs the risk; so, if he, without abduction, defiles a girl who is in fact under ten years old, with a belief that she is between ten and twelve. If the facts were as he believed, he would be committing the lesser crime. Then he runs the risk of his crime resulting in the greater crime. It is clear that ignorance of the law does not excuse. It seems to me to follow that the maxim as to *mens rea* applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be the facts, would, if true, make his acts no criminal offense at all.

It may be true to say that the meaning of the word "unlawfully" is, that the prohibited acts be done without justification or excuse. I, of course, agree that if there be a legal justification there can be no crime; but I come to the conclusion that a mistake of facts, on reasonable grounds, to the extent that if the facts were as believed, the acts of the prisoner would make him guilty of no criminal offense at all, is an excuse, and that such excuse is implied in every criminal charge and every criminal enactment in England. I agree with Lord Kenyon that "such is our law," and with Cockburn, C. J., that "such is the foundation of all criminal procedure."

The following judgment (in which Cockburn, C. J., Mellor, Lush, Quain, Denman, Archibald, Field and Lindley, JJ., and Pollock, B. concurred) was delivered by

BLACKBURN, J. In this case we must take it as found by the jury, that the prisoner took an unmarried girl out of the possession and against the will of her father, and that the girl was in fact under the age of sixteen, but that the prisoner, *bona fide*, and on reasonable grounds, believed that she was above sixteen, viz., eighteen years old. No question arises as to what constitutes a taking out of the possession of her father, nor as to what circumstances might justify such taking as not being unlawful, nor as to how far an honest though mistaken belief that such circumstances as would justify the taking existed, might form an excuse, for, as the case is reserved, we must take it as proved, that the girl was in the possession of her father, and that he

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took her, knowing that he trespassed on the father's rights, and had no color of excuse for so doing.

The question, therefore, is reduced to this, whether the words in 24 and 25 Vict., ch. 100, sec. 55, that whosoever shall take "any unmarried girl, being under the age of sixteen, out of the possession of her father," are to be read as if they were, "being under the age of sixteen, and he knowing that she was under that age." No such words are contained in the statute, nor is there the word "maliciously," "knowingly," or any other word used that can be said to involve a similar meaning.

The argument in favor of the prisoner must therefore entirely proceed on the ground that, in general, a guilty mind is an essential ingredient in a crime, and that where a statute creates a crime, the intention of the legislature should be presumed to be to include "knowingly" in the definition of the crime, and the statute should be read as if that word were inserted, unless the contrary intention appears. We need not inquire at present whether the canon of construction goes quite so far as above stated, for we are of opinion that the intention of the legislature sufficiently appears to have been to punish the abduction, unless the girl, in fact, was of such an age as to make her consent an excuse, irrespective of whether he knew her to be too young to give an effectual consent, and to fix that age at sixteen. The section in question is one of a series of enactments, beginning with sec. 48 and ending with sec. 55, forming a code for the protection of women and the guardians of young women. These enactments are taken, with scarcely any alteration, from the repealed statute, 9 Geo. IV, ch. 31, which had collected them into a code from a variety of old statutes, all repealed by it.

Sec. 50 enacts, that whosoever shall "unlawfully and carnally know and abuse any girl under the age of ten years" shall be guilty of felony. Sec. 51, whoever shall "unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years" shall be guilty of a misdemeanor.

It seems impossible to suppose that the intention of the legislature in those two sections could have been to make the crime depend upon the knowledge of the prisoner of the girl's actual age. It would produce the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years



old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanor, because she was in fact not above the age of ten. It seems to us that the intention of the legislature was to punish those who had connection with young girls, though with their consent, unless the girl was in fact old enough to give a valid consent. The man who has connection with a child, relying on her consent, does it at his peril, if she is below the statutable age.

The 55th section, on which the present case arises, uses precisely the same words as those in sections 50 and 51, and must be construed in the same way, and, if we refer to the repealed statute 4 and 5 Phil. and Mary, ch. 8, from the 3d section of which the words in the section in question are taken, with very little alteration, it strengthens the inference that such was the intention of the legislature.

The preamble states, as the mischief aimed at, that female children, heiresses, and others having expectations, were, un-awares of their friends, brought to contract marriages of disparagement, "to the great heaviness of their friends," and then to remedy this, enacts by the 1st section, that it shall not be lawful for anyone to take an unmarried girl, being under sixteen, out of the custody of the father, or the person to whom he, either by will or by act in his lifetime, gives the custody, unless it be *bona fide* done by or for the master or mistress of such child, or the guardian in chivalry, or in socage of such child. This recognizes a legal right to the possession of the child, depending on the real age of the child, and not what appears. And the object of the legislature being, as it appears by the preamble it was, to protect this legal right to the possession, would be baffled, if it was an excuse that the person guilty of the taking thought the child above sixteen. The words "unlawfully take," as used in the 3d section of 4 and 5 Phil. and Mary, ch. 8, means without the authority of the master or mistress, or guardian, mentioned in the immediately preceding section.

There is not much authority on the subject, but it is all in favor of this view. In *Reg. v. Robins*, 1 C. & K., 456, Atcherly, Sergt., then acting as judge of assizes, so ruled, apparently (though the report leaves it a little ambiguous), with the ap-

proval of Tindal, C. J. In *Reg. v. Olifier*, 10 Cox Cr. C., 402, Bramwell, B., so ruled at the Old Bailey, apparently arriving at the conclusion independently of *Reg. v. Robins*, 1 C. & K., 456. In *Reg. v. Mycock*, 12 Cox Cr. C., 28, Willes, J., without having the case of *Reg. v. Olifier*, 10 Cox Cr. C., 402, brought to his notice, acted on the case of *Reg. v. Robins*, 1 C. & K., 456, saying that a person who took a young woman from the custody of her father must take the consequences if she proved under age. And Quain, J., followed this decision in *Reg. v. Booth*, 12 Cox Cr. C., 231.

We think those rulings were right, and, consequently, that the conviction in the present case should stand.

The following judgment (in which Kelly, C. B., Cleasby, Pollock, and Amphlett, BB., and Grove, Quain and Denman, JJ., concurred) was delivered by

BRAMWELL, B. The question in this case depends on the construction of the statute under which the prisoner is indicted. That enacts that "whoever shall unlawfully take any unmarried girl under the age of sixteen out of the possession and against the will of her father, or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor." Now the word "unlawfully" means "not lawfully," "otherwise than lawfully," "without lawful cause," such as would exist, for instance, on a taking by a police officer on a charge of felony or a taking by a father of his child from his school. The statute therefore, may be read thus: "Whoever shall take, etc., without lawful cause." Now the prisoner had no such cause, and, consequently, except in so far as it helps the construction of the statute, the word "unlawfully" may in the present case be left out, and then the question is, has the prisoner taken an unmarried girl under the age of sixteen, out of the possession of and against the will of her father? In fact, he has; but it is said, not within the meaning of the statute, and that that must be read as though the word "knowingly," or some equivalent word was in, and the reason given is, that as a rule the *mens rea* is necessary to make any act a crime or offense, and that if the facts necessary to constitute an offense are not known to the alleged offender, there can be no *mens rea*. I have used the word "knowingly," but it will, perhaps, be said that here the prisoner not

only did not do the act knowingly, but knew, as he would have said, or believed, that the fact was otherwise than such as would have made his act a crime; that here the prisoner did not say to himself, "I do not know how the fact is, whether she is under sixteen or not, and will take the chance," but acted on the reasonable belief that she was over sixteen, and that though if he had done what he did, knowing or believing neither way, but hazarding it, there would be a *mens rea*; there is not one when as he believes, he knows that she is over sixteen.

It is impossible to suppose that, to bring the case within the statute, a person taking a girl out of her father's possession against his will is guilty of no offense unless he, the taker, knows she is under sixteen; that he would not be guilty if the jury were of opinion he knew neither one way nor the other. Let it be, then, that the question is, whether he is guilty where he knows, as he thinks, that she is over sixteen. This introduces the necessity for reading the statute with some strange words introduced; as thus: "Whosoever shall take any unmarried girl, being under the age of sixteen, and not believing her to be over the age of sixteen, out of the possession," etc. Those words are not there, and the question is, whether we are bound to construe the statute as though they were, on account of the rule that the *mens rea* is necessary to make an act a crime. I am of opinion that we are not, nor as though the word "knowingly" was there, and for the following reasons: The act forbidden is wrong in itself if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases which are not immoral in one sense, I say that the act forbidden is wrong.

Let us remember what is the case supposed by the statute. It supposes that there is a *girl*—it does not say a woman, but a girl—something between a child and a woman; it supposes she is in the *possession* of her father or mother, or other person having lawful *care or charge* of her; and it supposes there is a *taking*, and that that taking is *against the will* of the person in whose possession she is. It is, then, a *taking* of a *girl*, in the *possession* of some one, *against his will*. I say that done without lawful cause is wrong, and that the legislature meant it

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should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's, or even father's house, is wrong. She is at an age when she has a right to choose for herself; she is not a *girl*, nor of such tender age that she can be said to be in the *possession* of or under the *care or charge* of any one. I am asked where I draw the line; I answer, at when the female is no longer a girl in any one's possession.

But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, can be said to be in another's *possession* and in that other's *care or charge*. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute, an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause.

In addition to these considerations, one may add that the statute does use the word "unlawfully," and does not use the words "knowingly" or "not believing to the contrary." If the question was, whether his act was unlawful, there would be no difficulty, as it clearly was not lawful.

This view of the section, to my mind, is much strengthened by a reference to other sections of the same statute. Sec. 50 makes it a felony to unlawfully and carnally know a girl under the age of ten. Sec. 51 enacts, when she is above ten and under twelve to unlawfully and carnally know her is a misdemeanor. Can it be supposed that in a former case a person indicted might claim to be acquitted on the ground that he had believed the girl was over ten though under twelve, and so that he had only committed a misdemeanor; or that he believed her over twelve, and so had committed no offense at all; or that in a case under

sec. 51 he could claim to be acquitted because he believed her over twelve. In both cases the act is intrinsically wrong; for the statute says if "unlawfully" done, the act done with a *mens rea* is unlawfully and carnally knowing the girl, and the man doing that act does it at the risk of the child being under the statutory age. It would be mischievous to hold otherwise. So sec. 56, by which, whoever shall take away any child under fourteen with intent to deprive parent or guardian of the possession of the child, or with intent to steal any article upon such child, shall be guilty of felony. Could a prisoner say, "I did take away the child to steal its clothes, but I believed it to be over fourteen?" If not, then neither could he say, "I did take the child with intent to deprive the parent of its possession, but I believed it over fourteen." Because if words to that effect cannot be introduced into the statute where the intent is to steal the clothes, neither can they where the intent is to take the child out of the possession of the parent. But if those words cannot be introduced in sec. 56, why can they be in sec. 55?

The same principles apply in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer (10 Cox Cr. C., 362). Why? Because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered; or in housebreaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged; or that he had a defence under Lord Campbell's act, but was wrong; he could not be entitled to be acquitted because there was no *mens rea*. Why? Because the act of publishing written defamation is wrong where there is no lawful cause.

As to the case of the marine stores, it was held properly that there was no *mens rea*, where the person charged with the possession of naval stores, with the admiralty mark, did not know the stores he had bore the mark; *Reg. v. Sleep*, 8 Cox Cr. C., 472, because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose his servant had told him that there was a mark, and he had said he would chance whether or not it was the admiralty mark? So in the case of the carrier with game in his possession; unless he

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knew he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders; there was nothing wrong in sending such packages as were sent unless they contained vitriol.

Further, there have been four decisions on this statute, in favor of the construction I contend for. I say it is a question of construction of this particular statute in doubt, bringing thereto the common law doctrine of *mens rea* being a necessary ingredient of crime. It seems to me impossible to say that where a person takes a girl out of her father's possession, not knowing whether she is or is not under sixteen, that he is not guilty; and equally impossible when he believes, but erroneously, that she is old enough, for him to do a wrong act with safety. I think the conviction should be affirmed.

DENMAN, J. I agree in the judgment of my brothers Bromwell and Blackburn, and I wish what I add to be understood as supplementary to them. The defendant was indicted under the 24th and 25th Viet., ch. 100, sec. 55, which enacts that "whosoever shall *unlawfully* take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the wish of her father or mother, or of any other person *having the lawful care or charge of her*, shall be guilty of a misdemeanor."

I cannot hold that the word "unlawfully" is an immaterial word in an indictment framed upon this clause. I think that it must be taken to have a meaning, and an important meaning, and to be capable of being either supported or negatived by evidence upon the trial. See *Reg. v. Turner*, 2 Moo. Cr. C., 41; *Reg. v. Ryan*, 2 Hawk. P. C., ch. 25, § 96.

In the present case the jury found that the defendant had done everything required to bring himself within the clause as a misdemeanor, unless the fact that he *bona fide* and reasonably believed the girl taken by him to be eighteen years old constituted a defense. That is, in other words, unless such *bona fide* and reasonable belief prevented them from saying that the defendant, in what he did, acted "unlawfully," within the meaning of the clause. The question, therefore, is, whether, upon this finding of the jury, the defendant did unlawfully do the things which they found him to have done.

The solution of this question depends upon the meaning of the word "unlawfully," in sec. 55. If it means "with a knowledge and belief that every single thing mentioned in the section existed at the moment of the taking," undoubtedly the defendant would be entitled to an acquittal, because he did not believe that a girl of under sixteen was being taken by him at all. If it only means "without lawful excuse" or justification, then a further question arises, viz.: whether the defendant had any lawful excuse or justification for doing all the acts mentioned in the clause as constituting the offense, by reason, merely, that he *bona fide* and reasonably believed the girl to be older than the age limited by the clause. Bearing in mind the previous enactments relating to abduction of girls under sixteen, 4 and 5 Phil. & Mary, ch. 8, sec. 2, and the general course of the decisions upon these enactments, and upon the present statute, and looking at the mischief intended to be guarded against, it appears to me reasonably clear that the word "unlawfully," in the true sense in which it was used, is fully satisfied, by holding that it is equivalent to the word "without lawful excuse," using those words as equivalent to "without such an excuse as, being proved, would be a complete legal justification for the act, even when all the facts constituting the offense exist."

Cases may easily be suggested where such a defense might be made out, as, for instance, if it were proved that he had the authority of a court of competent jurisdiction, or of some legal warrant, or that he acted to prevent some illegal violence not justified by the relation of parent and child, or school mistress, or other custodian, and requiring forcible interference by way of protection.

In the present case the jury found that the defendant believed the girl to be eighteen years of age; even if she had been of that age, she would have been in the lawful care and charge of her father as her guardian by nature. See Co. Litt. 88, b. n. 12, 19th ed., recognized in *Reg. v. Howes*. 3 E. & E., 332. Her father had a right to her personal custody up to the age of twenty-one, and to appoint a guardian by deed or will, whose right to her personal custody would have extended up to the same age. The belief that she was eighteen would be no justification to the defendant for taking her out of his possession, and against his will. By taking her, even with her own consent, he must at

least have been guilty of aiding and abetting her in doing an unlawful act, viz.: in escaping, against the will of her natural guardian, from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done within the meaning of the clause. In other words, having knowingly done a wrongful act, viz.: in taking the girl away from the lawful possession of her father, against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of age beyond that limited by the statutes for the offense charged against him. He had wrongfully done the very thing contemplated by the legislature; he had wrongfully and knowingly violated the father's right, against the father's will, and he cannot set up a legal defense by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing.

*Conviction affirmed.*

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OSBORN vs. THE STATE.

(52 Ind., 526.)

ABDUCTION FOR PROSTITUTION: *Prostitution — Illicit intercourse.*

The indictment charged the abduction of "a female, etc., for the purpose of having illicit sexual intercourse with her." The statute is against abduction "for the purpose of prostitution." *Held*, that the indictment charged no offense under the statute, and should have been quashed. Prostitution means common, indiscriminate, illicit intercourse, and not illicit intercourse with one man only.

WORDEN, J. The appellant was tried, convicted, and sent to the state prison upon the following indictment, its sufficiency having been properly questioned, viz.:

"The grand jurors," etc., "in the name and by the authority of the state of Indiana, upon their oaths present and charge that on or about the 15th day of January, A. D. 1875, at and in the county of Franklin, and state of Indiana, one James T. Osborn unlawfully and feloniously enticed away one Alvaretus Faurote,



a female of previously chaste character, from said county of Franklin, in the state of Indiana, to the city of Jeffersonville, in the county of Clarke, in said state of Indiana, for the purpose of having illicit sexual intercourse with her, the said Alvaretus Faurote, contrary to the form of the statute," etc.

The indictment is based upon the following statutory provision, viz.:

"If any person shall entice or take away any female of previously chaste character, from wherever she may be, to a house of ill fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall be imprisoned in the state prison not less than two nor more than five years, or may be imprisoned in the county jail, not exceeding one year, and be fined not exceeding five hundred dollars; but in such case the testimony of such female shall not be sufficient, unless supported by other evidence, corroborating to the same extent as is required in cases of perjury, as to the principal witness." 2 G. & H., 441, sec. 16.

It will be seen by the indictment that the appellant is charged with having abducted the female "for the purpose of having illicit sexual intercourse with her;" and not "for the purpose of prostitution," as is provided for by the statute. The question arises, whether the facts charged come within the statute. We are of opinion, upon an examination of the authorities, that they do not.

The first case to which our attention has been called is that of *Commonwealth v. Cook*, 12 Met., 93. There Cook was indicted under a statute quite similar to our own. The court say, in speaking of the point here involved (p. 98): "The court are of opinion, that the offense made punishable by this statute is something beyond that of merely procuring a female to leave her father's house for the sole purpose of illicit sexual intercourse with the individual thus soliciting her to accompany him; that she must be enticed away with the view, and for the purpose, of placing her in a house of ill fame, place of assignation, or elsewhere, to become a prostitute, in the more full and exact sense of that term; that she must be placed there for common and indiscriminate sexual intercourse with men; or at least, that she must be enticed away for the purpose of sexual intercourse by others than the party who thus entices her; and that a mere en-

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ting away of a female for a personal sexual intercourse will not subject the offender to the penalties of this statute."

The next case is that of *Carpenter v. The People*, 8 Barb., 603. In that case, Carpenter was prosecuted under a similar statute, and the court came to the same conclusion as that arrived at in Massachusetts, though the Massachusetts case is not therein mentioned. The court say (p. 611): "We are entirely clear that by the expression in question" (prostitution), "as used in the statute, it was intended that in order to constitute the offense thereby created, the abduction of the female must be for the purpose of her indiscriminate, meretricious commerce with men. That such must be the case to make her a prostitute, or her conduct prostitution, within the act."

Following these cases is that of the *State v. Ruhl*, 8 Iowa, 447. The latter was also a prosecution under a similar statute, for enticing away a female for the purpose of prostitution. There was evidence of a purpose on the part of the defendant "to seduce and enjoy the body of the said Matilda" (the female), "and that he had taken her away, in order to have carnal intercourse with her, and did so enjoy her person; but there was no testimony that he purposed that she should be carnally enjoyed by others, nor that she should be devoted to promiscuous carnal intercourse, nor that he took her, or proposed taking her, to any house of prostitution." On these facts the defendant asked the following instruction, which was refused, viz.:

"If the defendant only intended to obtain the body of the said Matilda, for his own personal carnal enjoyment, and no more, then the act did not amount to her prostitution, in the sense of the law."

It was held that the charge should have been given, that the word "prostitution" means common, indiscriminate, illicit intercourse, and not sexual intercourse confined exclusively to one man. To the same effect is the still later case of *State v. Stoyell*, 54 Me., 24.

In view of these authorities, we think it clear that the indictment does not charge the abduction of the female "for the purpose of prostitution," within the meaning of the statute. The judgment below is reversed, and the cause remanded, with instructions to the court below to sustain the motion to quash the indictment.

The clerk will give the proper notice for the return of the prisoner.

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LYONS *vs.* STATE.

(52 Ind., 426.)

ABDUCTION FOR PROSTITUTION: *Chaste character—Evidence.*

A statute against the abduction of females of "previous chaste character" means, of actual personal virtue in distinction from a good reputation.

On the trial of an indictment founded on that statute, it is admissible to prove previous particular acts of illicit intercourse on the part of the female abducted.

DOWNEY, C. J. This was a prosecution for abduction, under sec. 16, p. 441, 2 G. & H. The defendant was convicted and sentenced to the state's prison. The refusal of the court to quash the indictment, and the overruling of the defendant's motion for a new trial, are assigned as errors. We see no valid objection to the indictment. There is a little surplusage in its allegations, but it is good, notwithstanding.

On the trial, the defendant proposed to prove acts of illicit sexual intercourse on the part of the prosecuting witness prior to the alleged abduction, but the court rejected the evidence. We think this was an error. In such a case the female must be of "previous chaste character." This has been held to mean that she shall possess actual personal virtue in distinction from a good reputation. A single act of illicit connection may, therefore, be shown on behalf of the defendant. *Bish. Stat. Crimes*, sec. 639; *Carpenter v. The People*, 8 Barb., 603; *Kenyon v. The People*, 26 N. Y., 203; *The State v. Shean*, 32 Iowa, 88; *Andre v. The State*, 5 id., 389; *Boak v. The State*, id., 430.

The preceding section relating to seduction is different. It only requires that the female shall be "of good repute for chastity."

The authorities cited by the state do not bear on the exact question under consideration.

The judgment is reversed, and the cause remanded for a new trial. The clerk will certify to the warden of the state prison as required by law.

## SLATTERY vs. PEOPLE.

(76 Ill., 217.)

*ABORTION: Statute construed — Intent — Admissions — Evidence.*

The respondent was convicted on an indictment charging him with feloniously beating and striking a pregnant woman with intent to cause her to miscarry. The statute under which the indictment was found is as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry," etc.: *Held*, that the statute only applies to those who intend to produce an abortion.

Silence under accusations is not always to be considered as an admission of their truth.

Where the respondent had promised to be on his good behavior at a family interview, to which he had induced a friend, by means of such promise, to go with him, it was *held* that his silence at that interview under harsh accusations should not be construed as an admission of their truth.

The evidence in this case *held* insufficient to justify a conviction.

BREESE, J. Plaintiff in error was indicted, at the June term, 1874, of the Hancock circuit court, for feloniously, unlawfully and maliciously beating, striking, kicking, pinching and crushing one Celestia Slattery, a pregnant woman, with intent, unlawfully, feloniously and maliciously to cause her to miscarry, and by means whereof she did miscarry.

The jury found the defendant guilty, and fixed his imprisonment in the penitentiary at three years. A motion for a new trial was denied, and judgment rendered on the verdict. The record is brought here by writ of error, and various errors assigned. Those which are deemed important will be noticed.

The section of the statute under which the indictment was found is as follows: "Whoever, by means of any instrument, medicine, drug, or other means whatever, causes any woman pregnant with child to abort or miscarry, or attempts to procure an abortion or miscarriage, etc., shall be imprisoned in the penitentiary not less than one year nor more than two years." Rev. Stat., 1874, p. 352.

This statute is evidently aimed at professional abortionists, and at those who, with the intent and design of producing abortion, shall use any means to that end, no matter what those means may be, but not at those who, with no such purpose in view, should, by a violent act, unfortunately produce such a re-

sult. The intent to produce an abortion must exist when the means are used. That is the charge in the indictment. It is there charged that the prisoner did feloniously and maliciously beat this pregnant woman with intent, unlawfully, feloniously, etc., to cause her to miscarry.

The party alleged to have been so treated is the wife of the prisoner, who, by his own confession, had not treated her in the kindest manner, but there is not a particle of proof in the record going to show that her miscarriage was caused by any violence he at any time used toward her, or that he had the least idea such would be the result, or that he desired or intended such a result.

A felonious and malicious intent to cause a miscarriage being charged in the indictment, circumstances sufficient to satisfy the jury of the intent should be shown.

A criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.

The only marks upon the person of Mrs. Slattery were a discoloration about a finger's length of one thigh, a mark on one of her arms, and a slight discoloration at one spot on her face, but how these were produced no witness testified. It was in proof she was about three months gone in pregnancy, had had three or four miscarriages previously, and but a short time before this last one, she had ridden some miles in a lumber wagon, to a dancing party, where she danced all night and into the morning, and rode home in the same conveyance.

One Taylor, claiming to be a doctor, gave it as his opinion that these marks appeared to have been made three or four days previous to the miscarriage, and in his opinion, produced it; whilst Drs. Thompson and Carlton testify, the bruises, as described by Taylor, would not cause miscarriage to a healthy woman. They further testify, after three or four miscarriages, it becomes habitual, and the chances are against the woman carrying the child the full time; and they further say that, with such a woman, lifting heavy weights, any hard work, fast walking, riding in a lumber wagon, dancing, or anything of that kind, would be liable to induce miscarriage.

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There is no question that the great preponderance of the evidence sustains the position taken by the prisoner's counsel, that miscarriage had become habitual with her, and the chances were all against her carrying this fœtus the full time.

We have said there was no evidence to show this miscarriage of the prisoner's wife was caused by any act of violence of his toward her. The weight of the testimony is the other way.

It is argued by the counsel for the people, it sufficiently appears from the testimony of her father, Joseph Larrimore.

Neither he nor Mrs. Larrimore, the mother, testify to any act of violence of their own knowledge, but claim that at Larrimore's house, where Mrs. Slattery then was, after her miscarriage, at an interview there held by the prisoner, at which was present his wife, her father and mother, a Mr. Bliss and a Mrs. Davis, the prisoner admitted many acts of violence which Larrimore specified, by not denying the accusations. No time was specified when these acts were done — whether years before or quite recently; and the prisoner was not in a position to deny, for he had promised Bliss, if he would go with him and be present at the interview, he would keep his temper — would be on his good behavior. He felt pledged to make no denial of any statement Larrimore should make, but to keep his temper under strict control, and let his father-in-law say what he pleased. At this interview not one word was said by Mr. or Mrs. Larrimore, or by Mrs. Slattery, or by anybody else, that her miscarriage had been caused by the prisoner's violence to her. It is strange, indeed, if such was the fact, the miscarriage so recent, and all the prisoner's enormities narrated with much apparent *gusto* by Larrimore, that he should not have charged this miscarriage as having been produced by the prisoner's violence. There is nothing of it in the proof.

We fail to find in this record anything connecting the prisoner with the crime charged, as it is defined in the statute book.

The judgment will be reversed, and the cause remanded, that a new trial may be had.

*Judgment reversed.*

NOTE. — The following are a few of the most important American cases which deal with the subject of silence as an implied admission:

Two watchmen took K. into custody and carried him to a watchhouse; and one of them there said that K. had been robbing a man; R. soon came in and

pointed to K. and said: "That man has stolen my money." While one of the watchmen was proceeding to lock up K., B. saw K. put something on the shelf in the watchhouse, and B. thereupon took from the shelf a bag of money, and R. said it was his bag, and that it was all the money he had; K. was within hearing of all that was said after he was carried to the watchhouse, and made no reply to any part of it: *Held*, that in the trial of an indictment against K. for stealing R.'s bag and money from his person, the declarations of the watchman and of R., to which K. made no reply, were not competent evidence of K.'s admission either of the fact of stealing, or that the bag and money were the property of R.

The opinion of the court was delivered by SHAW, C. J., who used this language:

"The circumstances were such that the court are of opinion that the declaration of the party robbed, to which the defendant made no reply, ought not to have been received as competent evidence of his admission, either of the fact of stealing, or that the bag and money were the property of the party alleged to be robbed. The declaration made by the officer, who first brought the defendant to the watchhouse, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made while he was under arrest, and in the custody of persons having official authority. They were made by an excited complaining party to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer. We are therefore of opinion that the verdict must be set aside and a new trial granted. *Commonwealth v. Kenney*, 12 Met. (Mass.), 235.

Upon the trial of an indictment for grand larceny, evidence was received, on the part of the prosecution, under objection, that after the arrest of the prisoners the prosecutor went to their place of custody to identify them; that he did identify them, and charged them with participation in the offense, stating to the officers the part each took, and describing the money stolen, to which the prisoners made no reply. Upon one of the prisoners was found two parcels of money, one answering the description given by the prosecutor; the prisoners requested that the two parcels should be kept separate, as the other was "bar money." *Held*, that the evidence was competent, as an implied acquiescence on the part of the accused in the truth of the prosecutor's statements.

In delivering the opinion of the court, ALLEN, J., makes this reference to the case above cited:

"The case of *The Commonwealth v. Kenney* (12 Met., 235) was peculiar in its circumstances, and the opinion by the learned chief justice, speaking for the court, would seem not to be in harmony with the current of authority in this country or in England, or with the elementary writers. It is distinguishable from this case, in this, that there was no direct evidence of the body of the offense, nor any evidence of the main fact, except as implied by the omission of the prisoners to deny the statement of the individuals claiming to have been robbed, of the fact of the robbery, and a description of the money lost. To make the evidence admissible as an implied admission of the fact stated, it had to be assumed that the accused had personal knowledge of the facts stated; for he was only called upon to deny and could only deny statements of the truth or falsity of which he had personal knowledge. Here the *corpus delicti* was proved by other evidence, and neither the declarations of the prosecution nor the admission of the prison-

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ers, either express or implied, were relied upon for that purpose." *Kelley v. People*, 55 N. Y., 565.

[The reasoning of the learned judge in this case, in attempting to distinguish it from *Commonwealth v. Kenney*, is fallacious, because in every case, the testimony to show an implied admission is admitted for the very purpose of showing that the accused has personal knowledge of the facts stated, and was an actor in the transaction. — REP.]

When a matter is stated in the hearing of one, which injuriously affects his rights, and he understands it and is silent, his silence may be taken as a tacit admission of the fact stated. But it is otherwise if it appears that the statement is made in the course of a judicial inquiry, or where circumstances existed which rendered a reply inexpedient or improper, or that fear, doubts of his rights or a belief that his security would be better promoted by silence than by a response, governed him at the time. *Donnelly v. State*, 2 Dutch. (N. J.), 601.

On the trial of an indictment for being a common seller of spirituous liquors, a witness testified that he saw six barrels being moved into the defendant's cellar, and that the teamster told him, in the defendant's presence, that they were barrels of gin; and the jury were instructed that the remark of the teamster could not be regarded by them, unless satisfied that the defendant heard it: *Held*, that this instruction might have been understood by the jury as implying that the defendant's silence was, at all events, and without reference to the accompanying circumstances, an acquiescence in the truth of what was said; and that the defendant was therefore entitled to a new trial. The court say: "An acquiescence, to have the effect of an admission, must exhibit some act of the mind, some purpose designed, some object intended. Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard, and the conduct understood. Nor is that alone sufficient. It should also be made to appear that the party to whose silence a consequence so important and material is attributed had not only an opportunity to speak for himself, but was in a situation where it would have been fit, suitable, or proper for him, or he would have been likely, according to common experience, to have done so. *Commonwealth v. Harvey*, 1 Gray (Mass.), 487.

In *Mattocks v. Lyman*, 16 Vt., 113, the plaintiff declared in assumpsit, on a special contract, by the terms of which he was to purchase wool which the defendants were to sell, and the profits were to be divided. The plaintiff, to prove the allegations in his declaration, introduced one Bradley as a witness, who testified that, at the request of the plaintiff, he called with him at the defendant's store, and that the plaintiff stated to the defendant Lyman, the terms of the contract, as set forth in the declaration, and said he was informed that the wool had been sold for a price which would entitle him to one-half of the profits, and demanded said proportion, and that Lyman's only reply was, that he was ready to settle with him, plaintiff; but that they did not owe him anything, but that he, plaintiff, owed them. On cross-examination, the witness said he did not recollect certainly that anything was said about the defendant's furnishing money for the plaintiff to purchase wool with. The jury were told that the testimony of Bradley was competent evidence, as tending to prove, by an implied admission on the part of the defendant Lyman, that the contract was as claimed by the plaintiff; but that its weight must depend upon the circumstances attending it, of which they were judges.



The opinion of the court was delivered by Redfield, J., who uses this language: "The most important practical question by far, discussed in the case, remains to be determined. It seems to have been generally considered that all conversation had in the presence of a party, in regard to the subject of litigation, might properly be given in evidence to the jury. But in *Vail v. Strong*, 10 Vt., 457, and in *Gaile v. Lincoln*, 11 id., 152, some qualification of this rule is established. It is there held, that unless a claim is asserted by the claimant or his agent, and distinctly made to the party, and calling naturally for a reply, mere silence is no ground of inference against one. And we think even in such a case, that mere silence ought not to conclude a party, unless he thereby induces a party to act upon his silence in a manner different from what he otherwise would have acted. There are many cases of this character when one's silence ought to conclude him. But when the claim is made for the mere purpose of drawing out evidence, as, in the present case, it is obvious must have been the fact, or when it is in the way of altercation, or, in short, unless the party asserting the claim does it with a view to ascertain the claim of the person upon whom he makes the demand, and in order to know how to regulate his own conduct in the matter, and this is known to the opposite party, and he remains silent, and thereby leads the adversary astray, mere silence is, and ought to be, no ground of inference against any one. The liabilities to misapprehension, or misrecollection, or misrepresentation, are such, that this silence might be the only security. To say, under such a dilemma, that silence shall imply assent to all which an antagonist may see fit to assert, would involve an absurdity little less gross than some of the most extravagant caricatures of this caricature-loving age. With some men, perhaps, silence would be some ground of inferring assent, and with others none at all. The testimony, then, would depend upon the character and habits of the party, which would lead to the direct trial of the parties, instead of the case."

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STATE vs. CLARK.

(54 N. H., 456.)

ADULTERY: *Proof of marriage in criminal cases — Indictment — Comparison of handwriting.*

Under an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with a single woman, the prosecution offered evidence tending to prove the marriage of the respondent in 1866. To avoid this marriage, the respondent testified in his own behalf that he had been married in 1864, to a woman who was still living, and from whom he had never been divorced: *Held*, that it was sufficient to maintain the allegation of the indictment, if the jury found either of these marriages to be a legal, subsisting marriage at the time of the cohabitation, and that the evidence as to both was properly submitted to the jury.

Evidence of a marriage in fact in a foreign jurisdiction is *prima facie* evidence of a valid marriage, and it is not necessary to prove the foreign law.

Where, in the trial, the respondent admitted the genuineness of a certain letter, it was held that the jury might use it to compare with the handwriting of

letters whose genuineness was disputed by the respondent, but to whose genuineness a witness testified.

Where an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with J., does not allege in express terms that J. is not his wife, but does allege that J. is a single woman, it sufficiently appears on a motion in arrest of judgment, that J. is not respondent's wife, and judgment will not be arrested.

INDICTMENT, charging that the respondent, on the first day of April, A. D. 1871, at Keene, in the county of Cheshire aforesaid, with force and arms, and from said day until the day of the finding of this indictment, did and ever since has continued to and still does lewdly and lasciviously associate and cohabit with one Charlotte M. Johnson, of said Keene, a single woman; he, the said Thaddens B. Clark, during all the time aforesaid being a married man and having a lawful wife alive, who had not during any of said time been absent, and not heard of or from for the space of three years together, nor reported and generally believed to be dead, and from whom the said Thaddens B. Clark has never been legally divorced, and his marriage with whom prior to all the time aforesaid did not take place within the age of consent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. The respondent pleaded not guilty, and upon the trial, offered himself as a witness, and testified. Upon his cross-examination, two letters were exhibited to him purporting to have been written by him to the Hudson woman hereinafter mentioned, but he denied that they were written by him. A letter was then exhibited to him purporting to have been written by him to a third person, which he admitted was genuine. The counsel for the state then proposed to read the Hudson letters to the jury, for them to consider if upon a comparison of those letters with the genuine one, they should be satisfied that they were all written by the same person. To this the respondent objected, but the court allowed the letters to be read, remarking to the jury, that they must not then draw any inference whatever from them, because it might be that they would not, upon a comparison of the three letters, be satisfied that the respondent wrote the two Hudson letters. To this the respondent excepted. Subsequently the Hudson woman testified that she received the two letters by mail, that she was well acquainted with the respondent's handwriting, and that those letters were in his handwriting.

The state offered as a witness Jennie M. Clark, who testified that on May 3, 1866, her name was Jennie M. Hudson; that she was then a widow; that on that day she was married to the respondent, at Binghamton, New York, by F. A. Durkee, a justice of the peace, and took from said Durkee a certificate of said marriage. A copy of this certificate was read in evidence without objection. Said Durkee was called by the respondent, and testified that he had been a counselor at law in Binghamton about twenty years; that he was a justice of the peace on said May 3, 1866, and for some time before and after, and in the habit of solemnizing marriages, and that he married the Hudson woman on that day to a man calling his name Clark, but that he was of the opinion that the respondent was not the man. The name inserted in the certificate was Thomas Clark. The respondent testified that he had sometimes gone by the name of Thomas Clark. The respondent testified, on cross-examination, that in the spring of 1864 he was married to Marietta Norton, in Elmira, New York, by James Dewitt, who was a justice of the peace; that he then had no living wife nor she any living husband; that that marriage was a legal marriage, he supposed. No objection was made, until after a verdict of guilty had been returned, to the validity of the Norton marriage, and none to the validity of the Hudson marriage, except that the man to whom the Hudson woman was married by Durkee was not the respondent.

The court instructed the jury that they were authorized to find that the Norton marriage was a legal one; also that they were authorized to find that the Hudson marriage was a legal one if the Norton woman had been lawfully divorced from the respondent previous to May 3, 1866. To these instructions the respondent excepted, upon the ground that there was no evidence that, by the laws of the state of New York at the time of those marriages, a justice of the peace was authorized to solemnize marriages in that state. The respondent did not require the state to prove that he cohabited with the Johnson woman as charged in the indictment, but admitted it. There was no evidence tending to show that the Norton woman had been divorced from the respondent, except what was derived from her own declarations. These declarations were introduced into the case as part of an affidavit of the respondent put in evidence by the state; also, as a part of sundry conversations which were proved. The court

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instructed the jury that they might consider these declarations, and were authorized to find that such a divorce had been procured; also, that if the respondent was informed that the Norton woman had been divorced from him, and used reasonable diligence and did all they thought he reasonably ought to have done to ascertain the truth of the report, and, upon the information he obtained, honestly believed that she had procured a lawful divorce, and that he had no living wife during the time he cohabited with the Johnson woman as charged in the indictment, then it would be their duty to bring in a verdict of not guilty.

The respondent moved for a new trial on account of said ruling and the instructions as to the validity of the marriages, and also moved in arrest of judgment on the ground that the indictment contains no averment that the living wife therein mentioned and the said Charlotte M. Johnson are not one and the same person. It distinctly appeared at the trial, and was not questioned, that the Norton woman, the Hudson woman and the Johnson woman are three different persons.

*Wellington*, solicitor, for the state.

*Healey* (with whom was *Faulkner*), for the defendant.

LADD, J. The first and most important question in the case is, whether there was evidence from which the jury might legally find the fact of a subsisting marriage between the defendant and some woman other than Charlotte M. Johnson at the time of the cohabitation with said Johnson charged in the indictment.

At the trial, the prosecution seems to have started out with the idea of relying on proof of a marriage in fact with Jennie M. Hudson, but on cross-examination of the defendant, the state's counsel drew from him the declaration that in the spring of 1864, he was married—legally married, as he supposed, to another woman, one Marietta Norton, by a justice of the peace in New York, and both Norton and Hudson being alive at the time of his cohabitation with Johnson, the defense take the ground that, no matter whether there was or was not evidence from which the jury could legally find the fact of marriage with Hudson, no matter with what due observance of all forms, civil or ecclesiastical, the rite was solemnized, it was no marriage, for the plain and sufficient reason that, being already at the same time once married to Norton, who was still in life, no form, no ceremony,

no religious vow, no civil contract could make Hudson his lawful wife, because two women cannot maintain that intimate relation with one man at the same time.

Thus far the defendant's legal position is certainly unassailable. But what next? It is plain that a marriage in fact with Norton is just as bad for the defendant's case, as a marriage with Hudson, and so his counsel say; and that is the argument of the brief, as I understand it; that the defendant's testimony as to his marriage with Norton is not evidence from which the jury could legally find the fact of such marriage; in a word, the contention is that a marriage with Norton was sufficiently proved to render nugatory the evidence of a marriage in fact with Hudson, introduced by the state, but not to lay the foundation for a conviction upon this indictment; that it was proved sufficiently to show that the defendant was guilty of bigamy in his marital relations with Hudson, but not sufficiently to show that he was guilty of the same crime with Johnson when he afterwards found it convenient to enlarge his connections by embracing her in his domestic establishment, which is obviously contending in the same breath that the fact of marriage with Norton was and was not proved by the defendant's testimony.

By our statute, "in actions for criminal conversation, and in indictments for adultery, bigamy, and the like, there must be proof of a marriage in fact." Gen. Stats., ch. 161, sec. 18.

Was there competent evidence from which the jury might find the fact of marriage here? First, how was it as to Hudson? She testified that on the third day of May, 1866, she was married to the defendant at Binghamton, N. Y., by F. A. Durkee, a justice of the peace, and a copy of the marriage certificate given her by Durkee was produced. Durkee testified that he was a justice of the peace at that time, and was in the habit of solemnizing marriages, and that on that day he married Mrs. Hudson to a man calling himself Clark, but was of opinion that the defendant was not the man. There is no dispute or discrepancy except as to the identity of the defendant, and that was clearly a matter for the jury.

This evidence shows a marriage ceremony duly performed by a person who was in fact a magistrate; and it is to be presumed that the magistrate acted within the scope of his legal power and authority, until evidence to the contrary appears. The case

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comes fully within the doctrine of *State v. Kean*, 10 N. H., 347. Indeed, in that case it was not shown either that the person who solemnized the marriage was in fact an ordained minister, or that, by the law of Maine, an ordained minister or any minister was authorized to solemnize marriages, although it did appear that he had for a long time officiated as a minister, and had married other persons. One objection therefore, to the proof of marriage in *State v. Kean*, namely, that the official character of the person solemnizing it was not shown, does not exist here; while the other, that it did not appear that by the law of Maine a minister was authorized to solemnize marriage, which seems to be identical with that taken by the defendant here, was overruled, and the proof of marriage held to be sufficient. That case must therefore be regarded as decisive of the present so far as regards the proof of marriage to Hudson. See Bish. M. & D., secs. 494, 495, 496.

But then comes the testimony of the defendant as to his marriage with Norton in 1864, and, as already observed, if the fact was as stated by him in reference to that marriage, the marriage with Hudson was no marriage at all, assuming that the tie had not been dissolved by death or a divorce. But his counsel argue that his testimony is not sufficient proof of a marriage in fact with Norton. If that be granted, it follows that the marriage with Hudson was the earliest and in fact the only marriage proved, and the case of the state, so far as regards proof of marriage, was made out; but if, on the other hand, we are to take it that the testimony of the defendant himself showed the fact of a marriage with Norton, his predicament is not changed, the only effect of that testimony being to change the marriage which is made the basis of his conviction.

If we look now at the instructions to which exception was taken, their only fault seems to be that they were too favorable to the defendant. In the first place, we think there was no competent evidence whatever of a divorce between Norton and the defendant. Therefore, allowing that question to go to the jury with the instruction given as to the legal effect of a belief on the part of the defendant that such divorce had been procured, opened to him one independent ground of defense, to which he was not entitled upon the evidence. But the court instructed the jury that they were authorized to find that the Norton marriage was

a legal one. So far, we have no doubt, the ruling was correct. It stands substantially the same as the proof of the Hudson marriage, which has been already considered, except that it rested upon the testimony of one witness who was present at the ceremony; that is, the defendant himself, instead of two. It all depended upon whether the jury believed the testimony of the defendant. As to that marriage, the case is not to be distinguished from *State v. Kean*.

The jury were further instructed that they were authorized to find that the Hudson marriage was a legal one if the Norton woman had been lawfully divorced from the respondent previous to May 3, 1866. That the jury were authorized to find the fact of marriage with either Norton or Hudson, from the evidence reported, we have already seen. We also hold that there was no evidence of a divorce. Now, it is not possible to say but that the jury may have found a divorce, when there was no legal evidence to sustain such finding. What follows? Simply that the verdict may rest upon the fact of marriage with Hudson, when it should rest upon the fact of marriage with Norton, for if the jury found a divorce obtained by Norton, whether upon competent or incompetent evidence, they must of necessity have found the fact of marriage with Norton; and inasmuch as we hold that there was evidence upon which they could legally find such marriage, though not a divorce, the defendant's situation was not changed, and it seems to be matter of demonstration that he was not prejudiced. No matter which horn of the dilemma be taken, the fact of marriage was made out and was certainly found by the jury before they could find a divorce from the first wife and a marriage to the second. That is, if the narrowest and most restricted interpretation possible be put upon the instruction, and it be understood to mean that the jury could not find a marriage with Hudson unless they first found a divorce from Norton, it was too favorable to the defendant, because they might have disbelieved the defendant's testimony and found no marriage with Norton. It would follow that they could find no divorce, and then, that although there was abundant proof of marriage with Hudson, still they could not find the fact, because they could not first find the fact of a divorce procured by Norton prior to May 3, 1866, the date of the marriage with Hudson.

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riage with Norton, there could be no divorce, and that in such case they would be at liberty to find a marriage with Hudson. But however that may have been, the only fault with the instructions clearly is, that they were too favorable to the defendant, and there can be no doubt but that the fact of marriage, as required by the statute, must have been and was found by the jury under instructions by which the defendant could not have been prejudiced. All it amounts to is, that the jury found the fact of both marriages when it was only necessary that they should find one.

The defendant excepted to the admission of two letters which the state claimed were written by him to Hudson. His own testimony and that of Hudson were directly in conflict. He swore he did not write the letters, and she swore they were in his handwriting, etc. It was competent for the jury to compare the letters with a writing of his admitted to be genuine, and the order in which the several steps were taken is of no consequence.

The remaining question is, as to the sufficiency of the indictment. This question arises upon a motion in arrest of judgment, on the ground that the indictment contains no averment that the living wife therein mentioned and the said Charlotte M. Johnson are not one and the same person. The indictment is evidently framed upon sec. 5 of ch. 256 of the Gen. Stats., which enacts that "if any person having a husband or wife alive shall marry or cohabit with any other person, such person so marrying or cohabiting shall be punished," etc.

The indictment charges that the defendant has and still does lewdly and lasciviously associate and cohabit with one Charlotte M. Johnson, single woman, he, the said Thaddeus B. Clark, during all the time aforesaid, being a married man, and having a lawful wife alive, etc. It is doubtless necessary that the indictment should set forth the offense in the language of the statute, or, at least, in terms equivalent. *State v. Gove*, 34 N. H., 510. And it is objected by the defendant's counsel in argument that the description of the offense is imperfect and insufficient in that respect, the words lewdly and lasciviously associated not found in the statute, being inserted in the indictment. We think this objection is not well founded, for the reason that those words may be stricken from the indictment as surplusage, and there still remains a clear and a distinct description of the statutory



offense, charged in the very language of the statute, namely, that the respondent, on, etc., did and still does cohabit with one Charlotte M. Johnson, single woman, etc.

But the indictment does not allege, in so many words, that Charlotte M. Johnson, a single woman, was not the lawful wife of Thaddeus B. Clark, a married man; and this is the fault upon which the motion in arrest was based, and which is mainly insisted on now by the defendant in support of that motion.

The case shows that it distinctly appeared at the trial, and was not questioned, that Norton, Hudson and Johnson were three different persons, and without this the verdict sufficiently settles the fact that Johnson was not the wife of the defendant Clark. Under the circumstances, it would seem to be a waste of time to inquire whether a form, that appears to have been used and approved without objection, is strictly and technically perfect or not. The objection comes too late. If the averment that Thaddeus B. Clark, a married man, cohabited with Charlotte M. Johnson, a single woman, is not a sufficient allegation that Johnson is another person from the lawful wife of Clark, we think the defect is one of form, and open to amendment under Gen. Stats., ch. 242, sec. 13. It differs widely from the cases referred to in the defendant's brief, where the fault was in the description of the offense.

The objections must all be overruled, and there must be

*Judgment on the verdict.*

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STATE vs. GOODENOW.

(65 Me., 30.)

ADULTERY: *Criminal intent — Ignorance of the law.*

On the trial of an indictment for adultery, the respondents offered to prove that they acted in good faith under the advice of a justice of the peace, and honestly thought they were committing no offense. *Held*, that the evidence was properly excluded.

Ignorance of the law is no excuse for crime.

To constitute a crime, there must be a criminal intent, but when an act is unlawful, an intent to do that act, having a full knowledge of the facts, is a criminal intent without regard to the party's knowledge of the law or that the act is unlawful.

INDICTMENT, alleging adultery on November 21, 1873.

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The female defendant was legally married to George W. Hussey, April 30, 1861, at Turner, where they subsequently cohabited as husband and wife. They afterwards separated; and, October 15, 1865, the defendants were united in marriage by one Isaac J. York, a justice of the peace, and they ever afterward cohabited as husband and wife. There was evidence that, December 14, 1873, George W. Hussey was alive at Byron, Michigan (the evidence being that his mother received a letter of that date, purporting to come thence from him by due course of mail), and that no divorce had ever been decreed between George W. Hussey and Lydia Hussey by the courts of this state.

The defendants offered to prove that, prior to June, 1865, George W. Hussey had deserted and abandoned the said Lydia, and that in June, 1865, he married another woman from Toronto, Canada, and introduced her to several persons in Portland, in this state, as his wife, and exhibited to them a certificate of the last named marriage; that he soon after left this state and had not returned; that October 16, 1865, the defendants exhibited to said York affidavits from various parties that Geo. W. Hussey had married another woman; that they were thereupon advised by said York that they could legally intermarry; and that they did so intermarry in good faith; all of which the presiding judge excluded, and the defendants, the verdict being guilty, excepted.

*L. H. Hutchinson and A. R. Savage*, for the defendants:

I. To sustain an indictment for adultery, three particulars must be proved; the *corpus delicti*; that one of the parties had been previously married to some other person, and that such person was alive at the time of the acts of adultery complained of. 3 Greenl. Ev., §§ 204, 207; 2 Whart. Crim. Law, §§ 2651-2; 43 Me., 258. These each must be proved. As regards the third, the mere presumption of the continuance of life is not sufficient. 3 Greenl. Ev., 207.

In the present case, the only evidence tending to show that the former husband of Mrs. Hussey was alive at the time alleged in the indictment was a letter purporting to have come from him to his mother. The handwriting of the letter was not even identified; and this evidence is, we contend, clearly insufficient to send a man and woman to state prison upon.

II. The defendants appear to have acted in entire good faith.

They sought and acted upon the advice of the officiating magistrate, who was presumably qualified to give them proper advice.

There are numberless instances where parties are relieved from the consequence of their acts, done in accordance with the advice of those whom they may reasonably suppose to be qualified to give the same, including magistrates and such; much more, they should not be condemned.

The evidence offered by the defendants, and excluded by the presiding justice, shows there was no knowledge or intent of committing any wrong, much less a crime.

Knowledge and intent, where material, must be shown by the prosecutor. 1 Whart. Crim. Law, § 631; *Wright v. The State*, 6 Yerg., 345.

The evidence offered and excluded shows that the defendants acted in good faith, and that the best meaning person by a mistake may be thrust into prison for a term of years.

*G. C. Wing*, county attorney, for the state, cited as directly in point *Commonwealth v. Nash*, 9 Met., 472; *Same v. Thompson*, 6 Allen, 591, and same parties, 11 Allen, 23.

PETERS, J. The respondents are jointly indicted for adultery, they having cohabited as husband and wife while the female respondent was lawfully married to another man who is still alive. The only question found in the exceptions is, whether the evidence offered and rejected should have been received. This was, that the lawful husband had married again, and that the justice of the peace who united the respondents in matrimony advised them that, on that account, they had the right to intermarry, and that they believed the statement to be true, and acted upon it in good faith. It is urged for the respondents, that those facts would show that they acted without any guilty intent. It is undoubtedly true, that the crime of adultery cannot be committed without a criminal intent. But the intent may be inferred from the criminality of the act itself. Lord Mansfield states the rule thus: "Where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof, the law implies a criminal intent." Here the accused have intentionally committed an act which is in itself unlawful. In

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excuse for it, they plead their ignorance of the law. This cannot excuse them. Ignorance of the law excuses no one. Be sure this maxim, like all others, has its exceptions. None of the exceptions, however, can apply here. The law, which the respondents are conclusively presumed to have known, as applicable to their case, is well settled and free from all obscurity or doubt. It would perhaps be more exact to say, they are bound as if they knew the law. Late cases furnish some interesting discussions upon this subject. *Cutler v. State*, 36 N. J., 125; *United States v. Anthony*, 11 Blatchf., 200; *United States v. Taintor*, id., 374; 2 Greenl. Cr. Law, 218, 244, 275, 589. *Black v. Ward*, 27 Mich., 191; *S. C.*, 15 Am. Law R., 162, and note, 171. The rule, though productive of hardships in particular cases, is a sound and salutary maxim of law. Then, the respondents say that they were misled by the advice of the magistrate, of whom they took counsel concerning their marital relations. But the gross ignorance of the magistrate cannot excuse them. They were guilty of negligence and fault, to take his advice. They were bound to know or ascertain the law and the facts for themselves, at their peril. A sufficient criminal intent is conclusively presumed against them, in their failure to do so. The facts offered in proof may mitigate, but cannot excuse the offense charged against them. There is no doubt that a person might commit an unlawful act, through mistake or accident, and with innocent intention, where there was no negligence or fault, or want of care of any kind on his part, and be legally excused for it. But this case was far from one of that kind. Here it was a criminal heedlessness on the part of both of the respondents to do what was done by them. The Massachusetts cases, cited by the counsel for the state, go much further than the facts of this case require us to go in the same direction, to inculcate the respondents. Besides those cases, see also *Commonwealth v. Elwell*, 2 Met., 190; *Commonwealth v. Farren*, 9 Allen, 489; *Commonwealth v. Goodman*, 97 Mass., 117; *Commonwealth v. Emmons*, 98 id., 6. We see no relief for the respondents except, if the facts warrant it, through executive interposition.

*Exceptions overruled.*

Appleton, C. J., Walton, Barrows, Danforth and Virgin, JJ., concurred.

## McKAY vs. STATE.

(44 Tex., 43.)

*ASSAULT: Intent — Ability to injure — Pointing unloaded weapon.*

On an indictment for an assault and battery, where the evidence showed that the respondent pointed an unloaded pistol at the prosecutor, at the distance of six paces, and ordered the prosecutor to kneel down, which he did through fear, it was *held* that this did not constitute an assault.

Under the Texas code pointing an unloaded weapon, without any actual intent to do physical injury, is not an assault.

In order to constitute an assault, there must be an actual intent to do a physical injury.

Where there is no ability to inflict injury, and this is known to the respondent, he cannot entertain the intent to do injury.

Fear on the part of the prosecutor cannot constitute a threatening act an assault, when there is no intent or ability to do physical injury, even though such fear is reasonable under the circumstances.

ROBERTS, C. J. The charge of the court, which presents the main issue in the case, is as follows:

"If the jury believe, from the evidence, that the defendant pointed an unloaded pistol at Daniel Duke (within shooting distance, if the pistol had been loaded), with intent to frighten him, at the same time ordering him to kneel down, and that the said Duke, not knowing that the said pistol was not loaded, was made to feel afraid, and caused to kneel down, the defendant is guilty of an assault."

This charge was given at the instance of the district attorney, the facts in proof being substantially in correspondence with it. The defendant's counsel asked three charges, to wit: That if the pistol was not loaded, or if defendant could not shoot Duke with it, or if he did not intend to shoot him, he could not be convicted; which were all refused by the court. The defendant was found guilty of a simple assault, and fined twenty-five dollars. He moved for a new trial because of the refusal of these charges, and that the verdict was not warranted by the evidence, as well as on other grounds, which being overruled, he gave notice of appeal.

This charge above set out, and the refusal of the counter charges, are the main matters deserving notice on the appeal.

This charge makes an apparent attempt to commit a battery by McKay, which produces the feeling of shame or fear in the

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mind of Duke, an assault. This is believed to be erroneous, because, the pistol of McKay being unloaded, it was impossible for him to have committed a battery upon the person of Duke, and because the actual injury in mind, such as shame or fear, suffered by Duke, which was caused by the apparent attempt of McKay to commit a battery on his, Duke's, person, is not a legal injury that constitutes an assault, it being shown that, by the means used, McKay did not have the ability to commit a battery.

These propositions, it is believed, can be maintained by a due consideration of the provisions of our penal code, that define and explain the offenses of assault and of assault and battery, which will lead to three important conclusions, having reference to this case:

1. That there is a marked difference between the legal injury resulting from the act and intent of the assailant, in the attempt to commit a battery, and in the actual injury of shame or fear, in the mind of the assailant, that may have been intended and produced by the act of the assailant.

2. To effect the legal injury indictable as an assault, the assailant must have the ability to commit a battery by physical violence on the person by the means used.

3. The actual injury of shame or fear in the mind of the assailed is not a necessary element in the offense of an assault, and the legal injury can exist as well without it as with it, and when shown to have been produced, it is pertinent in the case only as matter of aggravation to the legal injury.

An assault is an attempt to commit a battery. The variation in the terms contained in the definition are only different modes in stating the same thing. The definition is, that "any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it an immediate intention, coupled with an ability to commit a battery, is an assault."

Thus it is necessary to understand precisely what it takes to constitute a battery. The definition is, "the use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery."

This definition makes it necessary that two things should concur -- one physical, the other mental -- an act, an intent accom-

panying it, on the part of A., when he commits a battery on B., each of which requires a particular examination separately.

As to the physical act done by A., let it be supposed that A. strikes B. a blow with a stick on the head, and wounds him by a bruise that is painful; it is the blow given by A., and not the wound left on the head of B. that constitutes the physical act that is meant in the first part of the definition, by the expression, "use of violence upon the person of another." Violence upon the person, as here used, means the force upon the person, referring to the act of A. in using it on the person, and not to the intended effects on B. in receiving it on his person; for the existence of the pain, or shame, or other disagreeable emotion of the mind, on the part of B., as the effect or result of the blow on his person, is wholly immaterial, and need not be proved, and when proved in any case, is proved only as an aggravation of, and not as a necessary fact to the complete establishment of the battery. The means used by A. to exert the force on the person of B. may be anything capable of producing physical force, as the hand, the foot, a stick, a rock thrown by him, or a bullet shot out of a gun or pistol by him, so as to take effect on the person, however slight. Hence, it is described in the books by the expression, "the least touching of the person of another," the word touching having reference to the act of A. that took effect on the person of B., and not to the bodily or mental sensation of B. produced by it, further than that it did touch him. The case above supposed, presupposes and evinces that A. has had the physical capacity to do the act, and also embraces the additional element that he intended to do it, or that in the act of doing it, he intended to do something else, which was done so negligently or carelessly or recklessly as to be tantamount in law to the intention to do what he did; otherwise, the act would be purely accidental, and therefore not culpable.

In addition to the physical act done by A., with the accompanying intention, direct or indirect, as just specified, it must also be done "with intent to injure" B., in order to render the battery unlawful. This injury intended by A., the assailant, may be to the mind of B. as well as to his person. Our criminal code provides that "the injury intended may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind."

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It is not to be understood, however, that the effects upon the body and mind here enumerated as examples embrace all of the effects that may be intended by A., the assailant, to be produced on the body or mind of B., by the act of A. in committing a battery upon him. For in the same article it is said, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention." Thus, in a battery, when A. has used physical force upon the person of B., the combined intention to do the act and to injure him by doing it, thus embracing all of the intents necessary to complete the offenses, whatever they may be, is presumed in law as against A., unless it be shown that the act done by him was purely accidental, or that the intention with which the act was done by A. was innocent.

As in a case of homicide, the act of killing being proved, the malicious intent is presumed, and the legal injury is held to be consummated, whatever may be the one of thousands of motives that might have prompted the act, or whether any motive or specific intent can be discovered or not, unless some evidence can be adduced establishing a mitigation, excuse or defense.

In assault and battery, the necessary act, to wit, the "use of violence upon the person of another," is easily understood. But the necessary "intent to injure him" is not so easily explained by an affirmative description. Still, the necessary act being proved, the necessary intent to injure is known to exist as a legal necessity, whether we can discover, understand or explain it or not, so that the two concurring will constitute the legal injury of assault and battery, unless it be shown that the act was accidental or the intention was innocent. It may therefore be said that, practically, in legal contemplation, the proof of the necessary act either is or carries with it the proof of the necessary intention to injure, so as to constitute the legal injury, unless it is rebutted by evidence showing that the legal presumption should not be indulged, which may not be by showing an absence of intention to injure, but by showing that the intention was innocent with which the act was done.

This provision for presuming an intent from the proof of the act, pervades the whole criminal law, and is found prescribed in our criminal code as follows:

"Art. 1654. The intention to commit an offense is presumed



whenever the means used is such as would ordinarily result in the commission of the forbidden act.

"Art. 1655. On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." (Paschal's Dig., pp. 399, 400.)

The term "intent to injure" as part of the definition of an assault and battery, like the word malice in that of murder, can not be described in its full scope and meaning by an affirmative description only; and hence it is necessary to give an explanation of it so as to embrace any and every intent with which the act of violence upon the person of another is committed which is not shown to be an innocent intent, thus giving a negative as well as an affirmative description of what is meant, both of which is done in our code. (Paschal's Dig., art. 2138.)

Still, it is not necessary in assault and battery that any of the actual injuries that are expressly mentioned in the code should be felt or experienced in body or mind by B., the party assailed, as the result of the act of A. making the blow on the person of B., but the assault and battery and legal injury are complete if A. intended any such injury in striking the blow, and the law makes him intend the injury of some sort, unless the act is accidental or intent is innocent, and is so shown to be.

It follows necessarily, then, that what A. did, and intended to do, as proved or presumed, is what the law regards as the test of the legal injury in determining whether or not the offense of unlawful assault and battery has been committed, and not the fact of the pain, or constraint, or sense of shame or other disagreeable emotions of the mind of the party upon whose person the force has been used by the assailant. For the law regards the least touching of the person of another, unless accidentally or innocently done, an injury to society—to the state—whether the individual touched has thereby suffered the actual injury, either in body or mind, intended by the assailant or not.

An assault by A. upon B. embraces all of the elements of an assault and battery on him, with the single exception of the want of completeness in the performance of the act commenced by A., to be done which, if completed, would have been a battery.

An assault is an attempt to commit a battery; and "an at-

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tempt is, according to common legal understanding, an intent to do a thing combined with an act which falls short of the thing intended." (1 Bishop's Cr. Law, sec. 659.) The capacity to do the violence upon the person by the means used is equally implied and necessary in assault as in a battery; and the actual suffering of pain, constraint, shame, or other disagreeable emotion of the mind, on the part of the individual assailed, is equally unnecessary as an independent fact, and its nonexistence, if proved or admitted in any case, would not be a full defense to an action, either civil or criminal. This attempt is fully described in our code, so as to embrace every supposable mode of assault, as follows: "Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with the ability to commit a battery, is an assault." It must be noticed that this does not say "intention, coupled with the ability to commit" an injury on the individual, but "intention coupled with the ability to commit a battery" on him, which embraces the ability and the intention to use violence upon the person of the individual, and also the intention to thereby inflict injury of body or mind on him, as heretofore explained as being either proved or presumed.

Nor does it say any threatening gesture, showing in itself, or by words accompanying it, an immediate intention, coupled with an apparent ability to commit a battery, substituting in law, the appearance of an assault for an assault in fact. To prevent such a construction, the code provides that "by the terms 'coupled with an ability to commit,' as used in article 475, is meant:

"1. That the person making the assault must be in such a position that, if not prevented, he may inflict a battery on the person assailed.

"2. That he must be in such distance of the person so assailed as to make it within his power to commit the battery by the use of the means with which he attempts it."

And, lest that should not be plain enough, it is added that "it follows that one who is at the time of making an attempt to commit a battery under such restraint as to deprive him of the power to act, or who is at so great a distance from the person assailed as that he cannot reach his person by the use of the means with which he makes the attempt, is not guilty of an assault." And

still not satisfied with that, it is added that "pointing an unloaded gun, or the use of any like means with which no injury can be inflicted, cannot constitute an assault."

The word injury, as used in this last sentence, means the legal injury produced by an intentional use of force on the person of another, and not the actual injury of pain, or constraint, or shame, or other disagreeable emotions of the mind in the person assailed. For, if the legal injury or violence to the person was inflicted by the means used, it would not be material that it should produce the actual injury of the body or mind, such as shame, fear, and the like, provided any injury was intended. The word injury is used in these two different senses in explanation of this offense, from which arises the only obscurity or uncertainty attending the subject; but all which, it is believed, is susceptible of an easy explanation in harmony with the principles that have been announced. For instance, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention." Here, it is the legal injury that is caused by the violence to the person and from which the intention to commit the actual injury of the body or mind of the person assailed is presumed.

And again: "Any means used by the person assaulting, as by spitting in the face or otherwise, which is capable of inflicting an injury, comes within the definition of an assault, or an assault and battery, as the case may be." Here it is used in the sense of a legal injury, caused by physical violence used or attempted on the person, as it is in the article last quoted. This is so inferred from the example given of physical force, as spitting in the face, as well as those given in the preceding article, all of which as enumerated are appropriate means for inflicting physical force upon the person, and none of them that are enumerated are appropriate means, such as words, threats, hostile appearances, or the like, calculated to produce a moral or mental force upon the mind of the person assailed.

Threats and hostile appearances would often be as appropriate means of producing the actual injury of constraint, shame, or other disagreeable emotions of the mind, as blows with the hand, and frequently more so, and it is hardly to be supposed that they would have been omitted in the very careful enumera-

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tion of the means that could be used in committing an assault, or assault and battery.

In this view of the provisions of the code, it is not intended to lay down authoritative rules, as applicable to other cases coming under the articles reviewed, which are not directly applicable to this case, but to present general views preparatory to the proper consideration of the main question here now, which is, What is the legal effect of the pistol being unloaded?

Now, to apply these principles, so far as applicable, as deduced from our penal code, to the facts of this case, and to the charge of the court thereon. McKay pointed an unloaded pistol at and threatened to shoot Duke, ordering him to get on his knees, which he did. This was an act in itself, and coupled with words showing an intention to shoot him, with the intent to put him under constraint, and to produce shame or other disagreeable emotion of his mind. It was clearly an apparent assault, and to Duke, who was doubtless ignorant that the pistol was unloaded, it was calculated to and did excite fear, and a reasonable apprehension of death or serious bodily injury, and was so intended by McKay. It falls short of an assault under our code, because it is expressly declared therein that pointing an unloaded gun at a person cannot be an assault, giving the reason, in the same connection, that it is a means with which no injury can be inflicted, and it might be added, that the person pointing the gun, knowing it to be unloaded, could not possibly intend, then, to shoot the person pointed at.

The injury that such an act cannot produce is the legal injury of physical violence to the person of the individual pointed at, in contradistinction to the actual injury of him by constraint, shame, or other disagreeable emotion of the mind, which latter injury it most assuredly could, and generally would, be almost certain to produce. If it had been intended to make this actual injury of constraint or fear, when produced by any adequate means, the test of the criminality of the act producing it, surely the legislature would not have picked out the pointing of a gun, though unloaded, as the one to exempt, as a means that could not produce it, which act, above all others, most commonly produces that effect, when it is not known by the person pointed at to be unloaded. Yet it is so declared, without qualification, condition

or exception, that "pointing an unloaded gun cannot constitute an assault."

Seriously threatening a man to kill him, done in anger, is well calculated to produce the same effect, generally in a lighter degree only, and it is not enumerated as one of the means that can produce the legal injury that is indictable as an assault. Both together, pointing the unloaded pistol and the threats, as in this case, would not alter the nature of the actual injury of constraint or fear, or disagreeable emotion, but could only increase it in degree, which increase is only a matter of aggravation, and cannot be made a distinct ground of legal injury, when neither the pointing the unloaded pistol nor the threats, separately, can amount to a legal injury. (See Criminal Code, from arts. 2137 [475] to 2148 [486], both inclusive, Paschal's Dig.) As the acts and words of McKay put Duke under constraint, it may amount to false imprisonment, which may be accomplished by threats and various other means not amounting to, and do not, therefore, necessarily include an assault (Paschal's Dig., art. 2169 [508]). When "words are used, which are reasonably calculated to produce and do produce an act which is the immediate cause of death, it is homicide," committed by the person using them, and is then of such serious consequence that the law takes notice of the words as constituting the cause of the death (Paschal's Dig., art. 2207 [546]). There is no provision giving such or similar effect to mere words in the minor offenses, such as assault.

Whether pointing an unloaded gun or pistol is an assault, when the person pointed at is ignorant of the fact of its being unloaded, has long been a mooted question, which has been decided both ways by the courts, in both England and America, and as a question at common law, in reference to all of the decided cases bearing upon it, civil and criminal, it is one of difficulty, that has often been liable to changes of opinion and decisions, as may be seen by reference to the numerous cases cited in the elaborate brief of the attorney general in this case, for the definite settlement of which long continued conflict, it may be presumed, it was positively and unqualifiedly declared in the penal code, that "pointing an unloaded gun, or the use of any like means, with which no injury can be inflicted, cannot constitute an assault," which would be imperative on this court, had all the decisions, both in England and America, been one way,

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and that against this rule, instead of being vascillating and conflicting, as they have been.

Mr. Bishop, in his most valuable work on criminal law, says: "An assault is any unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury to a human being" (2 vol., sec. 32).

In the explanation of the different parts of the definition, he says, in reference to the peril or fear: "There is no need that the party assailed be put in actual peril, if only a well founded apprehension of danger is created," for the suffering is the same in one case as in the other, and the breach of the public peace is the same." He then gives the pointing an unloaded pistol as an instance, and says: "There must be, in such cases, some power, actual or apparent, of doing bodily harm, but apparent power is sufficient."

This makes an apparent force sufficient if it creates a well grounded apprehension of peril in the party assailed, and is believed to be contrary to the provisions of our code in two respects, to wit, the apparent force is made tantamount to the actual, and the well grounded apprehension of peril on the part of the assailed is made one of the elements of assault, whereas, by our code, if on the part of the assailant, the act coupled with the necessary intent to injure, as proved or presumed, is sufficient, it is immaterial whether or not fear of danger or well grounded apprehension of peril is created on the assailed, or even whether he was aware of the attempt or not.

If the pistol had been loaded, and otherwise in condition to shoot when it was intentionally pointed at Duke within a distance that it could take effect if discharged, the manifestation of anger, and the threats of McKay would have constituted extraneous and affirmative evidence of an express intention to injure, necessary and sufficient to make the assault complete. So, too, the pointing the pistol alone, under like circumstances if loaded, without the manifestation of anger and the threats, would of itself carry with it the presumption of the necessary intention to injure. Such act intentionally done by McKay would have put in imminent danger the life of Duke, who had given him no just cause to do it, and it is difficult to imagine how it could be possible to show McKay's intention in doing such an act to be innocent.

But, on the other hand, the pistol being unloaded, the pointing of it was not an act, nor the commencement of an act, that could possibly have resulted in a battery by such a use of it, and, therefore, the act necessary as an ingredient in an assault was totally wanting. For the error in the charge of the court, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

IRLAND, J., did not sit in this case.

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STATE *vs.* WILLIAMS.

(75 N. C., 134.)

ASSAULT AND BATTERY: *Rules of discipline — Voluntary associations.*

On the trial of an indictment for assault and battery, the evidence showed that the prosecutrix and the respondents were members of a society called Good Samaritans. The society had a ceremony of expulsion from the society. The prosecutrix becoming remiss in her duties, the respondents proceeded to perform the ceremony of expulsion, which consisted in suspending the prosecutrix from the wall by a cord fastened around her waist, the prosecutrix resisting: *Held*, that respondents were guilty of an assault and battery. Rules of discipline of voluntary associations must conform to the laws.

INDICTMENT for an Assault and Battery, tried before MOORE, J., at spring term, 1876, of Martin Superior Court.

The defendants and the prosecutrix were members of a benevolent society in Hamilton, N. C., known as the "Good Samaritans," which society had certain rules and ceremonies known as the ceremonies of initiation into and expulsion from the society.

The prosecutrix, having been remiss in some of her obligations, and having been called upon to explain, became violent. The defendants, with others, proceeded to perform the ceremony of expulsion, which consisted in suspending her from the wall by means of a cord fastened around her waist. This ceremony had been performed upon others theretofore, in the presence of the prosecutrix. She resisted to the extent of her ability.

There was conflicting evidence as to whether they lifted her from the floor, or intended to treat her differently from others who had been expelled, and it was shown that as soon as she cried out that the cord hurt her, she was released, and fainted immediately. Her dress was torn from her.

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The defendants' counsel contended that if the defendants only intended to perform the usual ceremony of expulsion, and were actuated by no other motive, and did not intend to hurt her, they were not guilty. That in order to commit a crime, there must be an unlawful act, coupled with a vicious will.

His Honor held that in any view of the case, if the defendants tied the cord around the waist of the prosecutrix as stated, they were guilty.

There was a verdict of guilty, and judgment thereupon. The defendants appealed.

Attorney General *Hargrew* for the state. *Mullen & Moore*, and *Walter Clark*, for prisoners.

BYNUM, J. When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery had the parties concerned not been members of the society of "Good Samaritans," it is not the less a battery because they were all members of that humane institution. The punishment inflicted upon the person of the prosecutrix was wilful, violent, and against her consent, and thus contained all the elements of a wanton breach of the peace. *Belt v. Hansley*, 3 Jones, 131. There is no error. The judgment will be certified.

*Judgment affirmed.*

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## HENDRIX vs. STATE.

(50 Ala., 148.)

ASSAULT AND BATTERY: *Reception of stolen property—Oath to jury—Breach of the peace.*

On the trial of an indictment for assault and battery, the respondent offered to prove that the assault and battery was committed in attempting to retake a horse which had been stolen from him a short time before, from a person in whose possession he found it. *Held* inadmissible, and that it would not excuse, justify, or mitigate the offense.

A man has no right to retake stolen property by a breach of the peace.

The oath to the jury in this case, viz.: "Well and truly to try the issue joined and a true verdict to render according to the evidence," was held sufficient under the Alabama statute.



BRICKELL, J. The defendant was indicted for an assault and battery on one Dallas Parvin. Evidence was offered on the trial tending to prove the commission of the assault and battery, and to show that it was caused by the refusal of the prosecutor to give up to the defendant possession of a mare which he was riding, and which was claimed by the defendant.

The defendant offered to prove that the mare was his property and had been stolen from him, a short time before, in Sanderdale county. The state objected to the admission of this evidence, and the court sustained the objection; and this ruling of the court, to which an exception was reserved by the defendant, is now assigned as error.

If the true owner is deprived of the possession of his property by fraud, force, or any other illegality, he may lawfully reclaim and retake it, whenever he can do so without a breach of the peace. But, as it is said by Blackstone, "The public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons, it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society." 3 Wendell's Blackstone, 4. If the evidence offered had been admitted, it could not have justified, excused, or mitigated the offense with which the defendant was charged. If his purpose was to reclaim his horse, he should have sought that purpose, not by violence, but through the peaceful remedies of the law. The law cannot countenance the substitution of physical violence in the place of these remedies. The court did not err in the exclusion of the evidence.

2. There was no error in the oath administered to the jury. They were sworn "well and truly to try the issue joined, and a true verdict to render according to the evidence."

This is a substantial compliance with the statute (Rev. Code, § 4092), and nothing more is required.

*Judgment affirmed.*

## COMMONWEALTH vs. COLLBERG.

(119 Mass., 351.)

ASSAULT AND BATTERY: *Fighting by mutual agreement.*

On an indictment for assault and battery where the evidence was that the respondent and another, by mutual agreement, went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons, and that both were bruised in the fight, which continued until one of the parties declared himself satisfied, it was held that each was guilty of an assault and battery on the other.

All fighting is unlawful, and it is of no consequence that it is by mutual agreement and without anger or malice on the part of those engaged in it.

ENDICOTT, J. It appears by the bill of exceptions that the parties by mutual agreement went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons. Both were bruised in the encounter, and the fight continued until one said that he was satisfied. There was also evidence that the parties went out to engage in and did engage in a "run and catch" wrestling match. We are of opinion that the instructions given by the presiding judge contained a full and accurate statement of the law.

The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill and activity, and "to fit people for defense, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. *Fost. C. L.*, 259, 260. *Com. Dig. Plead.*, 3 m., 18.

But prize fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. *Fost. C. L.*, 260; 2 *Greenl. on Ev.*, § 85; 1 *Steph. N. P.*, 211.

If one party license another to beat him, such license is void, because it is against the law. *Matthew v. Ollerton*, *Comb.*, 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. *Boulter v. Clark*, *Bull. N. P.*, 16. The same rule was laid down in

*Stout v. Wren*, 1 Hawks (N. C.), 420; and in *Bell v. Hansley*, 3 Jones (N. C.), 131. In *Adams v. Waggoner*, 33 Ind., 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought each other by mutual consent, but that such consent may be shown in mitigation of damages. See *Logan v. Austin*, 1 Stew. (Ala.), 476. It was said by Coleridge, J., in *Regina v. Lewis*, 1 C. & K., 419, that "no one is justified in striking another except it be in self-defense, and it ought to be known, that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it was immaterial who strikes the first blow. See *Rex v. Perkins*, 4 C. & P., 537.

Two cases only have been called to our attention, where a different rule has been declared. In *Champer v. State*, 14 Ohio St., 437, it was held that an indictment against A. for an assault and battery on B., was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the proposition, and we cannot but regard it as opposed to the weight of authority. In *State v. Beck*, 1 Hill (S. C.), 363, the opinion contains statements of law in which we cannot concur.

*Exceptions overruled.*

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#### DOEHRING vs. STATE.

(49 Ind., 56.)

ASSAULT AND BATTERY: *Arrest—Dangerous weapon—Question of fact—Policeman—Presumption.*

On an indictment against the respondent, a policeman, for an assault and battery on a brother of one whom he had arrested for larceny, without a warrant, and who was apparently endeavoring to assist the prisoner to escape, it was *held*, that what is a dangerous weapon is a question of fact and not of law, and that the court has no right to instruct the jury as matter of law, that a policeman's mace is a dangerous weapon.

A peace officer may lawfully arrest, without a warrant, one whom he has reasonable cause to suspect of a felony, and it is not necessary for his justification to establish the guilt of the suspected person.

If appearing that respondent was a policeman, the court will presume that he possesses the ordinary powers of a peace officer.

BUSKIRK, C. J. This was an indictment against the defendant

for an assault and battery upon the body of one Thomas Green. There was a trial by jury, a verdict of guilty, assessing a fine of one cent. There was a motion for a new trial, which was overruled, a motion in arrest of judgment, which was also overruled, and the court rendered judgment on the verdict.

The defendant was a policeman, of the city of Evansville, and as such, was informed that a brother of the prosecuting witness, Jim Green by name, had stolen a box of cigars. Upon that information, he arrested said Green. He was taking the prisoner to the city prison, and on his way there, passed the house of the prosecuting witness. The prisoner expressed a desire to see his brother, the prosecuting witness, and was told by the defendant that he could see him outside the house.

All the persons present agree in their testimony, that the prisoner attempted to either go into the house or escape, and that the appellant knocked him down twice with his mace. In the scuffle that ensued, the appellant and the prisoner got around the corner of the house of the prosecuting witness, about ten feet from the corner. At this point of time, the prosecuting witness heard the noise, and went out and placed his hand upon the shoulder of the appellant, and turned him around to the gas light. The theory of the state is, that the prosecuting witness heard the noise and went out to stop it, without knowing who the parties were, and that he gently laid his hand upon the appellant and turned him around to the gas light to see who he was. On the other hand, it is contended that the prosecuting witness knew who the parties were, and went out to aid his brother in escaping. All the witnesses agree, that he laid his hand on the officer before he was struck. The appellant struck him over his head with a mace. It is further argued, that it can make no difference what the real purpose of the prosecuting witness was, if the appellant had reason to believe, and did believe, that his purpose was to aid in the escape of his brother. The prisoner did, in fact, make his escape.

Counsel for appellant contend that the second instruction was erroneous, because the court told the jury that the weapon used was a dangerous one, when the question should have been submitted to the jury to determine, as a question of fact. The instruction was in these words: "In coming to a conclusion in this case, it is important that you should consider the character

of the weapon used. Custom seems to sanction the use by police establishments of pistols, maces, and other dangerous and deadly weapons, but they ought to use such weapons prudently. There can be no doubt, and as to this the jury and counsel for the state and defendant will fully agree with me, that the weapon used by the defendant in this case was a dangerous weapon. Did he use it recklessly or cruelly, or did he use it prudently?"

It is the duty of the court to charge the jury as to all matters of law applicable to the facts proved. It is the province of the jury to ascertain the facts. The question of whether a particular weapon was or was not dangerous, was a question of fact, and not of law, and hence should have been submitted to the jury for ascertainment. *Barker v. The State*, 48 Ind., 163.

It is also claimed that the court erred in giving the following instruction: "If the defendant made the arrest of James Green for a felony, on information and not on view, he made it at his own peril; and in order for him to justify the assault upon Thomas Green, the prosecuting witness, when it becomes a matter of inquiry, it devolves upon the defendant to show that the party under arrest was guilty of the crime for which he was arrested."

In our opinion, the instruction was clearly erroneous.

It never was necessary, under the law, for a peace officer to "show that the party under arrest was guilty of a crime for which he was arrested." A peace officer has a right to arrest without a warrant, when he is present and sees the offense committed. He has a right to arrest without a warrant on information, when he has reasonable or probable cause to believe that a felony has been committed; and herein there is a distinction as to the extent of his authority. In cases of misdemeanor, the officer must arrest on view or under a warrant; in cases of felony, he may arrest without a warrant, upon information, where he has reasonable cause. And the reasonable or probable cause is an absolute protection to him, "when it becomes a matter of inquiry," and in no case is he bound to establish the guilt of the party arrested. 1 Hilliard Torts; 49 Ind., 2d ed., 233, 234, 235, and notes.

In *Holley v. Mix*, 3 Wend., 350, the court held: "If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed

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and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal though an officer would be justified if he acted upon information from another which he had reason to rely upon."

In *Samuel v. Paine*, 1 Doug., 359, Lord Mansfield held that if any person charge another with felony, and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed.

In a MS. note of a case of *Williams v. Dawson*, referred to by counsel in *Hobbs v. Branscomb*, 3 Camp., 420, Mr. Justice Buller laid down the law, that "if a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but that if he receives a person into custody, on a charge preferred by another of felony or breach of the peace, then he is to be considered as a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable."

In *Hobbs v. Branscomb*, *supra*, Lord Ellenborough, in speaking of the rule laid down by Judge Buller, said: "This rule appeared to be reasonable, and that very injurious consequences might follow to the public, if peace officers, who ought to receive into custody a person charged with a felony, were personally answerable, should it turn out that in point of law no felony had been committed."

In 1 Chit. Crim. Law, 22, the law is stated thus: "Constables are bound, upon a direct charge of felony, and reasonable grounds of suspicion laid before them, to apprehend the party accused, and if upon a charge of burglary, or other felony, he be required to apprehend the offender, or to make hue and cry, and neglect so to do, he may be indicted. And a peace officer, upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed, because, as observed by Lord Hale, the constable cannot judge whether the party be guilty or not, till he come to his trial, which cannot be till after his arrest; and, as observed by Lord Mansfield in *Samuel v. Paine*, if a man charges another with a felony, and requires another to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound first to try, and, at his peril, exercise his judgment in

the truth of the charge; he that makes the charge should alone be answerable; the officer does his duty in conveying the accused before a magistrate, who is authorized to examine and commit, or discharge."

The law applicable to arrests by a private person is stated with great precision and clearness by Tilghman, C. J., in *Wakeley v. Hart*, 6 Binn., 316; where, after quoting a provision of the state constitution and commenting thereon, it is said: "But it is nowhere said, that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon, who is seen to commit murder or robbery, must be arrested on the spot or suffered to escape. So although not seen, yet if known to have committed a felony, and pursued with or without a warrant, he may be arrested by any person. And even when there is only probable cause of suspicion, a private person may without warrant at his peril make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution."

We think the instruction under examination, when applied to arrests by a private person, expresses the law correctly, but when applied to arrests by peace officers, is clearly erroneous.

It is, however, insisted by the Attorney General, that there is nothing in the record showing that the appellant possessed the powers of an ordinary peace officer. The city of Evansville is governed by a special charter, which does not define the powers of the police force. The charter confers on the common council power "to establish, organize and maintain a city watch, and prescribe the duties thereof," and "to regulate the general police of the city."

The ordinances of the city, defining the duties and prescribing the powers of the police force, were not read in evidence. It is earnestly claimed that we cannot, under these circumstances, indulge the presumption that the appellant possessed the powers of a conservator of the peace. We take notice of the existence of, and the powers conferred by, the city charter, and that Evansville has a city government. It was proved that the appellant was acting as a policeman in such city. We think we should indulge the presumption, that the police force of such a

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city possessed the ordinary powers of peace officers at common law, but we do not think the presumption should be carried beyond the powers possessed by conservators of the peace at common law.

A full and accurate statement of the powers and duties of the police force, under the general act of incorporation of cities, will be found in *Boaz v. Tate*, 43 Ind., 60.

The judgment is reversed, with costs; and the cause is remanded for a new trial, in accordance with this opinion.

*Judgment reversed.*

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COMMONWEALTH vs. HAWKINS.

(11 Bush, Ky., 603.)

ASSAULT AND BATTERY: *Breach of the peace—Former conviction—Statute construed.*

On an indictment for an assault and battery, the respondent pleaded that he had been tried, convicted and fined for a breach of the peace, and that said conviction was for the identical facts charged in the indictment. On appeal from an order dismissing the indictment, the facts alleged in the plea being admitted to be true, it was *held*, that the plea was good, and the former conviction a bar to the prosecution of the indictment.

A statute which punishes the inflicting of wounds by shooting or by cutting, thrusting or stabbing with a knife, dirk, sword or other deadly weapon, does not embrace striking and wounding with a pair of blacksmith tongs, and an indictment charging the latter was *held* to charge a simple assault and battery only.

COFER, J. The indictment in this case charged that the appellee "did, in sudden heat and passion, without previous malice, and not in self-defense, *strike* and wound George Gregory with a pair of blacksmith tongs, which said tongs was then and there a deadly weapon."

The appellee, in a plea of former conviction, alleged that he had been arrested and tried and convicted before a justice for a breach of the peace, committed by fighting with George Gregory, and had paid the fine assessed against him, and that said conviction was for the identical acts charged in the indictment.

A demurrer to the plea having been overruled, the commonwealth confessed the facts stated therein, and the indictment was



dismissed, and this appeal is prosecuted to obtain a reversal of that judgment.

The indictment does not state facts constituting an offense within section 1, article 17, chapter 29 of the General Statutes. That section only applies to wounds inflicted by shooting, or by *cutting, thrusting or stabbing* with a knife, dirk, sword, or other deadly weapon, and does not embrace a *wounding* such as is charged in this case.

The indictment was therefore good only as an indictment for an assault and battery, and the question is, whether a conviction for a breach of the peace is a bar to a subsequent prosecution for an assault and battery constituting a part of the transaction.

This question came before this court in 1837, in *The Commonwealth v. Miller*, 5 Dana, 370, and it was then held, though not without some hesitation, that conviction for a breach of the peace, unless obtained by the fraud or collusion of the party pleading, was a bar to an indictment for an assault and battery committed in the breach of the peace for which the defendant had been fined.

Since that time the subject has been repeatedly passed upon by courts of last resort, both in this country and England, and we think the decided weight of authority is in accord with the former decision of this court.

The breach of the peace for which the appellee was tried is a distinct offense from that of assault and battery for which he was indicted, but was embraced in the latter because there can not be an assault and battery without a breach of the peace.

The breach of the peace being included in the assault and battery, it is impossible that the appellee should be convicted of assault and battery without being also convicted of the breach of the peace; and thus, as he has already been found guilty of a breach of the peace, he would be in jeopardy a second time for the same offense—*i. e.*, for breach of the peace—and if convicted and punished, he would be twice punished for one offense, which is repugnant to both the common law and our own written constitution. 1 Bish. Cr. Law, sec. 683.

*Judgment affirmed.*

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## PAULK vs. STATE.

(52 Ala., 427.)

BASTARDY: *Imprisonment for debt — Evidence.*

Bastardy is a penal proceeding, and has some of the characteristics of a civil action and some of a criminal prosecution. Imprisonment of the putative father for non-compliance with a judgment in a bastardy proceeding does not infringe the constitutional provision against imprisonment for debt.

In a bastardy proceeding, it seems that it is proper to show on behalf of the defendant that the child resembles a third person, who has had opportunity for illicit intercourse with the mother.

In a bastardy proceeding, evidence to show that the bastard resembled the children of a man who had been seen with the prosecutrix is inadmissible, being too remote and unsatisfactory.

APPEAL from the Circuit Court of *Randolph*.

Tried before Hon. JOHN HENDERSON.

This was a proceeding against appellant under the statutes for bastardy. On the issue before the circuit court as to the paternity of the child, the mother testified that appellant was its father. The defendant then introduced a witness who testified that he "had seen one Clark Messmer with the prosecutrix on two occasions since the commencement of the prosecution, and that both times they were going in the direction of the court house;" that he had seen the bastard child and "*that it favored Clark Messmer's children.*"

To the italicised portion of this testimony the state objected, and the court thereupon excluded it from the jury.

The jury having found the issue against defendant, and he being unable to give bond, the court sentenced him to jail, as the statute requires. The defendant denying the power of the court under the constitution, to make such order, objected and excepted to the sentence.

*William H. Smith*, for appellant:

I. Under the constitution there can be no imprisonment for debt. None of our laws make bastardy a crime. The proceedings authorized by the statute are not criminal. The governor cannot pardon the defendant. If the parties marry, or the child dies, the proceeding abates. It is a mere proceeding, then, to enforce the performance of a civil duty in behalf of a particular individual; in other words, a debt. No statute makes it a criminal offense to refuse to give the bond. The case against defend-

ant is not required to be made out beyond a "reasonable doubt." Everything shows that it is a mere civil proceeding.

II. Proof to show the probability of another guilty agent is always admissible. The evidence, however weak, cannot be excluded if it has a tendency to prove the issue. Brickell's Digest, 809, § 82. That the proof offered was admissible on an issue of paternity, see Lord Mansfield in *Douglass Case*, Wills on Circumstantial Evidence.

*John W. A. Sanford*, Attorney General, *contra*.

BRICKELL, C. J. A proceeding under the statute to compel a putative father to the support and education of a bastard child, during the helplessness of mere infancy, has some of the characteristics of a civil action and of a criminal prosecution. It is commenced by a complaint on oath, on which a warrant of arrest issues in the name of the state. A preliminary examination is had before a justice of the peace of the county in which the woman is pregnant or delivered of the child, and if sufficient evidence appears, the accused is recognized to appear at the next term of the circuit court. If he fails to enter into the recognizance with sufficient sureties, he is held in custody. Entering into the recognizance and failing to appear in obedience to it, a forfeiture is incurred, and a writ of arrest issues against him, as in criminal cases on indictment. On his appearance in the circuit court, an issue is made up to which he and the state are the parties, to ascertain whether he is the real father of the child. If this issue is found against him, judgment is rendered against him for the costs, and he is required to give bond and security payable to the state, conditioned for the payment annually, for the period of ten years, of such sums not exceeding fifty dollars a year, as the court may prescribe, for the support and education of the child. Failing to give the bond, the court renders a judgment against him of necessity, in the name of the state, for such sum as at legal interest will produce the sum he is required to pay yearly, and "he must also be sentenced to imprisonment for one year, unless in the mean time he execute the bond required, or pay the judgment and costs." R. C., §§ 4396-4406. The proceeding is certainly penal in its character, if not strictly criminal. On the trial in the circuit, the accuser and the accused are alike competent witnesses. It can be commenced only on

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the complaint of the mother. No indictment or presentment by a grand jury is necessary to support it. It abates on the death of the child, and the marriage of the mother and putative father vacates the proceeding, though it has progressed to final judgment. It is a penal proceeding intended to relieve the state from the duty of maintaining the illegitimate child, rather than to inflict punishment for the violation of law. It is founded on the hypothesis that it is a duty due to society from the putative father to maintain and educate his illegitimate child, and the purpose is to compel performance of this duty. *Judge of County Court v. Kerr*, 17 Ala., 328; *Salterwhite v. State*, 28 id., 65.

The constitutional inhibition of imprisonment for debt is not infringed by the imprisonment of the putative father if he fails to execute the bond required of him on conviction. He is imprisoned not for the failure to pay a debt, but for his failure to perform a duty—a duty enforced in the name of the state, for the protection of the state.

On an issue formed in a bastardy proceeding, it is doubtless competent for the defendant to prove that the child bears no likeness or resemblance to him, or that it resembles some other person, who had opportunities of illicit intercourse with the mother. This was not the kind of evidence offered by the appellant. The proposition was to permit a witness to state the bastard child favored the children of another man. It was not proposed to show these children favored their father. A child often resembles only his mother, and has none of the distinguishing features or physical peculiarities of the father. Nor was it offered to show what were the particulars in which the bastard resembled or favored the children of the person named. It was the mere opinion of the witness that the children did bear a resemblance. There is nothing about which the opinions of individuals differ so widely as personal likeness or resemblance. One discovers it, where another, instead of finding traces of it, finds distinctive marks of opposition. The evidence was too vague and uncertain, too inconclusive in its nature, to have gone to the jury. It could not have exerted any legitimate influence on the verdict they were required to render. In the case of *Commonwealth v. Webster* (5 Cush., 302), it was material for the defendant to show that the person he was charged to have slain was in life after a particular hour of a certain day. Witnesses

were introduced who testified that they saw him in various places in Boston, after that hour. To rebut this evidence, it was proposed to show there was a person about the streets of Boston, at that time, who bore a strong resemblance to the deceased in form, gait, and manner, and had, by persons acquainted with the deceased, been approached and spoken to, for the deceased. The evidence was rejected as too remote and unsatisfactory, and was properly rejected. *The judgment is affirmed.*

PEOPLE *vs.* CHRISTMAN.

(66 Ill., 162.)

BASTARDY: *Degree of proof—Judgment.*

Bastardy, though in form criminal, is in effect a civil proceeding and a preponderance of evidence is sufficient to justify a conviction.

A judgment for the payment of several instalments of money and the costs of prosecution and that the defendant "execute a proper and sufficient bond for the payment of the judgment herein in due form of law" is held not open to the objection that it requires the defendant to give a bond for the payment of the costs.

SHELDON, J. This was a prosecution on a charge of bastardy, where a verdict and judgment were rendered against the defendant, from which he has appealed.

It is urged that the verdict was against the evidence. After a careful examination of the testimony, we find that it sustains the verdict, and that there is no sufficient ground for disturbing the finding of the jury upon the evidence.

We perceive no error in the instructions. It is objected to the first one, that it tells the jury they may convict on a preponderance of evidence. It has often been held by this court that the proceeding in question, though in form criminal, is, in effect, a civil proceeding, and that it is not essential to a conviction that the evidence of guilt should exclude every reasonable doubt, but that a preponderance of proof will be sufficient. *Mann v. The People*, 35 Ill., 467; *Maloney v. The People*, 38 id., 62; *Allison v. The People*, 45 id., 37.

It is objected to the form of the judgment, that it requires the defendant to give a bond for the payment of the instalments for

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the support of the child. The defendant is adjudged to pay the several instalments of money and the costs of the prosecution, and to "execute a proper and sufficient bond for the payment of the judgment herein in due form of law."

The statute only requires the bond to be given for the payment of the instalments of money adjudged to be paid, and we do not think the judgment should be construed as requiring anything more than the statute does, in this respect. We consider, then, that under the judgment, the defendant is only required to give bond for the instalments, and not for the costs of suit.

The judgment must be affirmed.

*Judgment affirmed.*

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McCOY vs. PEOPLE.

(65 Ill., 439.)

BASTARDY: *Sufficiency of evidence.*

On a charge of bastardy which is supported only by the uncorroborated testimony of the prosecutrix, she being contradicted by three unimpeached witnesses, as to her having had sexual intercourse with others besides the defendant about the time the child was begotten, and it appearing that she had previously charged the paternity of the child on another man, the evidence is held too unsatisfactory to fix the paternity of the child on the defendant.

SHELDON, J. The proof of the charge of bastardy made in this case rests upon the unsupported testimony of the complainant.

She testified that she gave birth to the child on the 15th day of August, 1871; that it was the result of a single act of illicit intercourse between herself and the defendant, in the middle or latter part of November, 1870, and that that was the only instance of such intercourse she ever had with the defendant or any other person.

On the part of the defense, the defendant, by his own testimony, denied the charge in all its parts.

Another witness testified that he himself had sexual intercourse with the complainant as often as once, and sometimes twice, a week, during the months of October and November, 1870, and that during her pregnancy she informed him of her condition, and inquired of him what he was going to do about it. Two other witnesses testify to having surprised the complainant and

still another person in the direct act of sexual intercourse, in October or November, 1870.

The complainant had informed her own father that the father of the child lived at Shannon, in another county, that of Carroll; in consequence of which, her father went there to see the person on the subject. The defendant never lived at that place, as the complainant herself testified. This was a circumstance affecting the credibility of her testimony.

The witnesses on the part of the defendant were in no way attempted to be impeached, save that, as to two of them, it was relied upon as detracting from their credibility, that, previous to the making of the complaint in this case, they had made voluntary affidavits, before a justice of the peace, of the facts which they testified to on the trial.

In view of the whole testimony, a majority of the court regard it as too unsatisfactory to fix the paternity of the child upon the defendant, and the court below should have set aside the verdict as being clearly against the weight of evidence, and have granted a new trial.

The judgment is reversed and the cause remanded.

*Judgment reversed.*

#### PEOPLE vs. BROWN.

(34 Mich., 339.)

**BIGAMY:** *Void second marriage — Marriage of negro and white woman.*

It is no defense to a charge of bigamy that the second marriage was one between a negro and a white woman, which is prohibited and made void by statute; for every bigamous marriage is void.

**BIGAMY:** *Gist of the offense — Two elements of illegality.*

It is the entering into the void marriage while a prior valid marriage exists, that constitutes the gist of the offense; and it cannot help matters any that there are two elements of illegality in the case, instead of one. It is no valid reason for relieving a person from the consequences of violating one statute, that the act of doing so violated also another.

#### EXCEPTIONS from Recorder's Court of Detroit.

Submitted on brief June 13. Decided June 20.

*A. J. Smith*, Attorney-General, for the People, argued that a bigamous marriage is always void; that no man can lawfully marry when he is already married; that the gist of the offense is

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the going through the ceremony of marriage and living with the woman as if married when the party is already lawfully married; that the violation of two statutes does not relieve from liability under either; that two wrongs do not make a right; that even where the second marriage is incestuous, the offender is nevertheless liable for bigamy. Bishop on Stat. Cr., § 590-2, and note; *Ree v. Benson*, 5 C. & P., 412; *Reg. v. Brown*, 1 C. & K., 144; *Hayes v. People*, 5 Parker, 325; Roscoe Cr. Ev., 309-10; 2 Bishop Cr. L., § 1025.

*James H. Garlock*, for respondent, to the point that to sustain a conviction for bigamy, the second marriage must have been such a one as would have been in all respects legal and valid, except for the fact that the defendant then had a former wife living, cited: 3 Greenl. Ev., § 205; Bishop on Stat. Cr., § 592; *Reg. v. Fanning*, 17 Irish C. L., 289; 10 Cox C. C., 411; *Burt v. Burt*, 2 Swaley & Tristram, 88; *Carmichael v. State*, 12 Ohio St., 554; *Hayes v. People*, 25 N. Y., 398; *Reg. v. Miller*, 10 Cl. & F., 689.

COOLEY, C. J. The defendant seeks to avoid the penalties of a bigamous marriage by showing that he is a negro, and that the other party to the marriage was a white woman, with whom, under the statute, it was impossible for him to contract marriage at all. Comp. L., § 4724. The argument is, that if the ceremony of marriage has taken place between parties who, if single, would be incapable of contracting marriage, the marriage ceremony is merely idle and void, and the respondent cannot be said to have been married the second time at all.

The logic of the argument is not very obvious. It certainly cannot be based upon any idea that there must be something of binding and obligatory force in the second marriage; for every bigamous marriage is void, and it is the entering into the void marriage while a valid marriage exists that the statute punishes. Nor can we understand of what importance it can be that there are two elements of illegality in the case instead of one, or why the party should be relieved from the consequences of violating one statute because the act of doing so was a violation of another also.

The authorities sanction no such doctrine. There are loose statements in some of the cases, that the second marriage must



have been one that, but for the existence of the first, would have been valid; but these evidently relate to the acts and intent of the parties, and not to the legal ability to unite in a valid relation. It was decided in *Ree v. Benson*, 5 C. & P., 412, that bigamy was committed in marrying a woman under an assumed name, though by law such a marriage between persons capable of contracting would be void. The case of *Regina v. Brown*, 1 C. & K., 144, was similar to the present in its facts, and Lord Denman in summing up said: "It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, otherwise it never could exist in ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the life time of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify, for the woman, having a husband then alive, has committed the crime of bigamy, by doing all that in her lay by entering into marriage with another man." These cases are recognized in the case of *Hayes v. People*, 25 N. Y., 390, which is relied upon by the respondent, but which affords no countenance for his exceptions.

The recorder's court must be advised that we find no error in the record, and that judgment should be pronounced on the verdict.

The other justices concurred.

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#### COMMONWEALTH vs. JACKSON.

(11 Bush (Ky.), 679.)

##### BIGAMY: Evidence of marriage.

In a prosecution for bigamy, evidence of the declarations of the respondent that a certain woman was his wife, and of the fact that he had lived with, recognized, introduced and represented her as his wife, is sufficient evidence of a marriage to submit to the jury.

In a prosecution for bigamy, the first marriage may be proved by the admission of the respondent, in connection with recognition and cohabitation, but these are only facts tending to show an actual marriage, which must be found as a fact by the jury.

COFER, J. The appellee was indicted in the Lewis circuit

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court for the crime of bigamy, and was tried by a jury, and under a peremptory instruction of the court, was found not guilty, and the attorney general prosecuted this appeal under section 331 of the Criminal Code, in order to obtain the opinion of this court upon the point decided adversely to the commonwealth by the circuit court.

The only evidence of a marriage of the appellee prior to that alleged to be polygamous, consisted of evidence of his declarations that another woman was his wife, and of the fact that he had lived with, introduced and represented her as his wife.

One witness testified that the appellee came to Maysville as early as September, 1874, and engaged to sell sewing machines for him; that he then said he was a married man, and that his wife was in Higginsport, in the state of Ohio; that he (witness) subsequently let the appellee have money with which he said he wanted to bring his wife from Higginsport to Maysville; that he brought a lady to Maysville, whom he introduced to witness as his wife, and boarded with her in a respectable family; that the lady gave birth to a child while in Maysville, and that the appellee told him it was his child, and that his wife had given birth to another child, which had died in Ohio, the funeral expenses of which the witness paid at appellee's request.

Another witness testified that two or three weeks before the alleged second marriage, the appellee applied to him for a horse and buggy to take his wife to the railroad depot, saying she was going to Louisville; and a third witness swore that appellee lived with the woman that came from Higginsport, and claimed that she was his wife.

The circuit judge seems to have been of the opinion that an indictment for bigamy could not be maintained without proof of the fact of two marriages, either by record evidence or by the testimony of one or more witnesses who were present at the solemnization of the marriage rites; or, in other words, that the declarations and conduct of the defendant admitting his marriage, and living with and recognizing the woman as his wife, were not sufficient to warrant the jury in finding a verdict against him.

This is a subject about which there is irreconcilable conflict in the authorities. In Massachusetts, New York, and Connecticut, and perhaps in some other states, it has been held that in prosecutions for bigamy, an actual marriage of the prisoner must be

proven, and that neither cohabitation, reputation, nor the confessions of the prisoner are admissible for that purpose, or if admissible, are not of themselves sufficient to warrant conviction. *The Commonwealth v. Littlejohn and Barbarick*, 15 Mass., 163; *Boswell's Case*, 6 Conn., 446; *The People v. Humphrey*, 7 Johns., 314. On the other hand it has been held in South Carolina, Virginia, Georgia, Alabama, Ohio, Pennsylvania, Maine, and Illinois, that in prosecutions for bigamy the confessions of the prisoner deliberately made are admissible as evidence to prove marriage in fact, and in some of those states, that such confessions are of themselves sufficient to authorize the jury to convict. *Britton's Case*, 4 McCord, 256; *The State v. Hilton*, 3 Richardson, 434; *Warner v. The Commonwealth*, 2 Virginia Cases, 92; *Cook v. The State*, 11 Ga., 53; *Cameron & Cook v. The State*, 14 Ala., 546; *Wolverton v. The State*, 16 Ohio, 173; *Murtagh's Case*, 1 Ashmead, 272; *Forney v. Hallacher*, 8 Serg. and Rawle, 159; *Cayford's Case*, 7 Greenl., 57; *Harris' Case*, 2 Fairf. (11 Me.), 392; *State v. Hodgkins*, 11 Me., 155; *Jackson v. The People*, 2 Seam., 231.

These were not all prosecutions for bigamy, but they were all cases in which the prosecution could only be made out by proof of a marriage in fact, and the same principle which would admit evidence of the admissions, confessions, or conduct of the prisoner in such of them as were not for bigamy, would also authorize its admission in prosecutions for that crime.

The American cases in which it has been held that evidence of such declarations, confessions, and conduct is not admissible, or, if admissible, is not of itself sufficient to warrant conviction, seem to rest on the authority of *Morris v. Miller*, Barr, 2056, and *Birt v. Barlow*, Douglas, 171.

These were actions for *crim. con.*, in which the plaintiffs attempted to establish their marriages by giving in evidence their own declarations, and proving their recognition of, and cohabitation with, the women alleged to be their wives.

In the former case, Lord Mansfield said: "There must be evidence of a marriage in fact; acknowledgment, *i. e.*, acknowledgment of the husband by the wife; cohabitation, and reputation are not sufficient in *this action*." And he gives his reasons for so holding. "It shall not depend," said he, "upon the mere reputation of a marriage which arises from the conduct or de-

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clarations of the *plaintiff himself*." Again he says: "No inconvenience can possibly arise from this determination. But inconvenience might arise from a contrary decision which might render persons liable to actions founded on evidence made by the persons themselves who should bring the actions." And twelve years later, in deciding the case of *Birt v. Barlow*, he gave the same reasons for a like decision.

And this additional reason seems to us to be entitled to considerable weight in support of the rule announced by Lord Mansfield in those cases, and by this court in the case of *Kibby v. Rucker*, 1 A. K. Marsh., 290, as applicable to actions for *crim. con.* In such cases the plaintiff knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must often be wholly ignorant of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place, as it is generally the case with bigamists, in some other state or country. Another difficulty in the way of the government under the rule that the first marriage must be established by record evidence, or by the testimony of one or more witnesses present at the marriage, and which does not exist in actions for *crim. con.*, is, that the government cannot read the depositions of witnesses, and may be unable to procure the attendance of those residing out of the state, while the plaintiff in *crim. con.* may procure and read depositions to prove the fact of his marriage.

But Lord Mansfield did not say in *Morris v. Miller*, as some have supposed, that a prisoner's words and conduct could not be given in evidence against him to prove, in a prosecution for bigamy, the fact of his having been previously married, or that such evidence would not of itself authorize a conviction. He said, it is true, that "in a prosecution for bigamy, a marriage in fact must be proved;" and this we do not for a moment doubt is now and has always been the law; but Lord Mansfield goes on to say: "We do not at present define what may or may not be evidence of a marriage in fact," and thus left open the very

question which he has been quoted as deciding, which, as already stated, seems to be the foundation upon which the American cases rest, which hold that direct and positive proof is required. That Lord Mansfield did not mean to decide that a marriage in fact could not be proved by evidence of the declarations and conduct of the prisoner is not only clear from the case in which he has been supposed to have made that decision, but is further shown by his decision in *Mary Norwood's Case*, (1 East's Cr. Law, 337), where he, with the concurrence of Lord Chief Justice Parker, and Justices Smythe, Bathurst and Parrot, determined that seven years' cohabitation and several admissions by the prisoner that a person was her husband, by calling him by that appellation, was not only competent, but sufficient evidence to prove a marriage in fact.

Mr. Phillips in his work on Evidence (vol. 2, pp. 210-12), in commenting on the case of *Morris v. Miller*, says: "This decision does not warrant the conclusion that a distinct and full acknowledgment made by the defendant himself will not be evidence of the fact as against him, and sufficient to dispense with more formal and strict proof."

In *Truman's Case*, 1 East, 470, it was decided that his conviction of bigamy obtained upon his confession of marriage was proper.

In *Cook v. The State*, Justice Nesbit, in delivering the opinion of the supreme court of Georgia, said: "Acknowledgments, cohabitation, repute, etc., in ordinary civil cases, prove marriage; but it is said in criminal cases, as in prosecutions for bigamy and adultery, a marriage in fact must be proved, . . . and that the admissions of the defendant are not competent. As a general rule, the confessions of a party, freely and solemnly made, are the highest evidence. So reasonable and well settled is this rule that the exceptions to it, to be sustained, ought to rest upon the most unassailable ground." And again he says it can not be presumed that the prisoner made confessions contrary to the truth, in order to shield himself from prosecution for adultery, upon the assumption that he was, in fact, living in a state of adultery. "Such assumption a court has no right to make;" and we may add that, a request coming from one charged with bigamy, that the court shall assume, in order to acquit him of one crime, that he is guilty of another, and has likewise imposed

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Mr. Justice White, in delivering the opinion of the supreme court of Virginia, in *Warner v. The Commonwealth*, said: "In all criminal prosecutions as well as civil actions, the confessions of a party, his admissions, and acts amounting to confessions or admissions, are not only admissible, but often the strongest evidence against him, and not unfrequently supply the place of evidence of a higher character which would otherwise be called for;" and this is equally true in a prosecution for bigamy as in every other case. Why should it not be? Is there anything in that crime or in its punishment which ought to give to it a distinct code of the law of evidence, or to give to those accused of it privileges not extended to those accused of other crimes?

Mr. Greenleaf says (2 Greenl. on Ev., sec. 49): "Any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that such relation exists; and if the defendant has seriously and solemnly admitted the marriages, it will be received as sufficient proof of the fact." If a defendant indicted for adultery can be convicted upon evidence of his admission that the woman with whom the crime was committed was the wife of another, without any other evidence of a marriage in fact, *a fortiori*, one indicted for bigamy may be convicted on his deliberate admission of his own marriage, or that the alleged wife was such in fact, when that admission is coupled with evidence of recognition, cohabitation, and provision for her as a wife, and acknowledgment that he is the father of her children.

Again, Mr. Greenleaf says, the marriage of one indicted for bigamy may be proved "by the deliberate admission of the prisoner himself." (Greenl. Ev., vol. 3, sec. 204.)

Mr. Chitty, in a note to the title "Indictments for Bigamy or Polygamy," says: "Any evidence seems to be sufficient which will convince the jury that an actual marriage was completed." (Chit. Crim. Law, 472.)

In *Regina v. Upton* (1 Car. & Kir., 165) it was held that on indictment for bigamy or adultery, the prisoner's deliberate declaration that he was married to the alleged wife was sufficient evidence of marriage.

From this notice of English and American authorities it seems to us that neither the common law of England, as adopted in this country, nor the American common law, as recognized by the courts of the various states, requires us to hold one charged with the crime of bigamy can not be convicted upon clear and satisfactory proof of his declarations that the alleged wife is legally such, when those declarations are coupled with evidence of cohabitation with her, and her introduction by him into a community where he resides, as his wife. We think the safety, the happiness, and the honor of families, the good order of society, the preservation of the public morals, and a due regard to public decency and individual virtue, demand that the rules of the law should furnish every facility for the punishment of crimes which a proper regard for the security of the innocent will allow.

It is difficult to perceive any reason for discriminating between admissions to prove a marriage and other facts essential to constitute the legal guilt of the accused; there can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner, and the fact that he has cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence tending to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding the prisoner was in fact married to the alleged wife, and unless they so believe they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which the proof of actual marriage is necessary to make out his guilt upon the same legal footing with those charged with other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes, subjecting the offender to like punishment.

We are therefore of the opinion that the court erred in giving to the jury a peremptory instruction to find the appellee not guilty.

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## McDADE vs. PEOPLE.

(29 Mich., 50.)

BURNING: *Statute construed.*

In a statute which provides that "every person who shall set fire to any building, \* \* or to any other material with intent to cause any building to be burned, or shall, *by any other means*, attempt to cause any building to be burned," the words "by any other means" must be construed to mean by any other means of a like nature; and an attempt to cause a building to be burned by soliciting a third person to set fire to it, and furnishing him with the materials, is not within the statute.

COOLEY, J., *dissenting*

ERROR to Alpena Circuit.

*Atkinson & Hawley*, for plaintiff in error.*Byron D. Bull*, Attorney General, for the people.

GRAVES, C. J. This is a writ of error to the circuit court for the county of Alpena. The plaintiff in error was convicted and sentenced to the state prison upon the following charge, as embodied in the second count of the information filed against him by the prosecuting attorney:

"And said prosecuting attorney further gives said court to understand and be informed that heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-two, at the city of Alpena, in said county, Patrick McDade did wilfully, feloniously and maliciously solicit and invite one Patrick Blaney, unlawfully and feloniously to set fire to and burn a certain building, to wit, the warehouse there situate of Lorenzo M. Mason, Charles E. Mason and Benjamin F. Luce, and did then and there, for the purpose aforesaid, furnish said Blaney with a large quantity of oil, to wit, one pint, and a large quantity of matches, to wit, ten matches, towards the commission of said offense, whereby and by means of the premises, the said Patrick McDade did attempt to cause said building to be burned, contrary to the statute in such case made and provided."

It was claimed in the court below, and is now insisted upon here, that the facts set forth in this court do not constitute in law an indictable offense. The charge in the information was framed under § 7557, Comp. L., which reads as follows:



"Every person who shall set fire to any building mentioned in the preceding sections" (and a warehouse is such building), "or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned, shall be punished by imprisonment in the state prison not more than fifteen years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not more than one year."

On returning to the information, it will be observed that the count on which the conviction was had contains no averment that Blaney, the person alleged to have been solicited to commit the act of setting fire, took any step towards the execution of that act, or did any act whatever which might inculcate the plaintiff in error as accessory.

The charge in the information is made to rest entirely at last upon McDade's conduct in soliciting Blaney to burn the warehouse. The additional circumstance introduced, that he also furnished oil and matches, is not such an one as can be considered an essential ingredient of the substantive offense intended to be set forth. The addition of this fact in no manner helps to fill up the measure required by the statute, and the charge would be as valid without it as with it. If the provision relied on will support such a charge as that actually made, it would equally well support one based on the solicitation, and not attended by the incidents introduced as to the furnishing of oil and matches.

The question, then, is, whether this law will warrant a charge based on solicitation. It is a well settled general rule, and one especially applicable in the interpretation of statutes which define crimes and regulate their punishment, that general words are to be restrained to the matter with which the act is dealing, and that if it be dealing with specific things or particular modes only, the general words must be limited to such things or modes, except when it is apparent that the legislature intended by the general words to go further. *American Transportation Company v. Moore*, 5 Mich., 368; *Hawkins v. The Great Western R'y Co.*, 17 id., 578; *Matter of the Ticknor Estate*, 13 id., 44; *Phillips v. Poland, L. R.*, 1 C. P., 204; *Hall v. The State*, 20 Ohio, 7; *Duggett v. The State*, 4 Conn., 60; *Chegaray v. The Mayor*, 3 Kerr, 220; 1 Bishop Cr. L., sec. 149; *Dwarris*, 621.

This rule is now invoked to show that the statute, in prescrib-

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ing what should constitute an indictable attempt to cause a building to be burned, contemplated the employment of some physical means, and not merely the soliciting of a third person to set the fire. The counsel for the plaintiff in error argues that the previous members of the section deal with the physical act of firing the building itself or of firing some other material with the intent that the building, as a consequence, shall be burned, and that the succeeding general expression counted on by the prosecution, "or shall by any other means attempt to cause any building to be burnt," must be understood as intending some means of the same nature, some physical act, either personally by the party himself, or through another directed to the end sought.

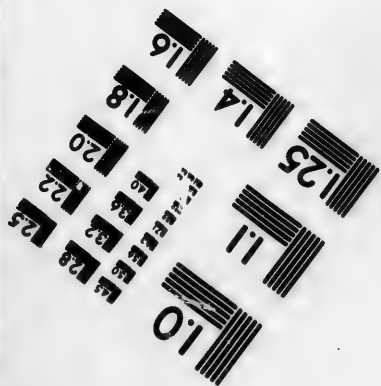
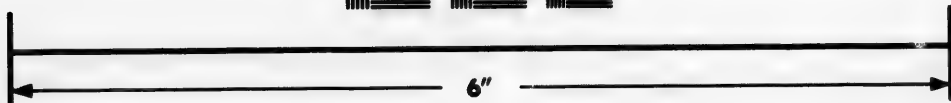
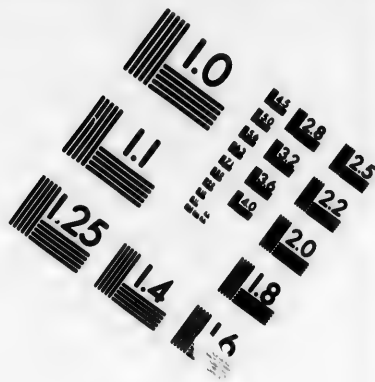
The attorney general argues that the first and specific portion of the section covers every possible direct and indirect mode of attempt to cause a building to be burnt, excepting an attempt consummated by solicitation, and that therefore, in order to give the general clause in the latter part of the section any meaning and operation, it is indispensable to read it as explicitly applying to the single fact of malicious solicitation to burn.

Without pausing to adduce illustration to impugn this position of the prosecution, touching the scope of the specific provisions, it is sufficient to say that it cannot be maintained that the particular clauses in the first part of the section include every possible mode, other than that consisting of personal solicitation in which a person may set about the burning of a building.

The application of means directly to the building, and the application of means directly to some other material, certainly do not exhaust the physical agencies which are possible in attempts to cause buildings to be burnt. Both branches of the passage preceding the general clause relate, and are confined, to cases where fire is actually set, and it needs no nice reasoning to show that a person may fall short of his object, and employ physical means of the same nature and in the same direction, in attempting to cause the burning. The argument, then, against the position of the plaintiff in error, fails.

Passing this topic, we come to other views which deserve notice.

The specific provisions of the section expressly refer to the kind of buildings mentioned in preceding sections, while the



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general clause which follows uses the general expression, "any building," and therefore does not, like the earlier definite clause, distinctly and expressly confine itself to a special and determinate class of buildings. Now we cannot suppose the legislature meant, by this general phrase, to go beyond the objects intended to be protected by the earlier and definite provisions, and make an attempt to cause "any building" to be burnt, whatever its value or character or use, an offense liable to be punished by imprisonment in the state prison for fifteen years. It is very obvious that this expression, "any building," should be limited, and read as agreeing with the specification immediately preceding, namely: "any building mentioned in the preceding sections."

We find, then, that in one respect, at least, this general clause must submit to limitation; and that the legislature must have intended that it should be construed, in so far, at any rate, in subjection to the rule before quoted. In framing this portion of the law, we must accordingly conclude the legislature were not minded to employ terms which, by themselves and apart from precedent matter, were suited to exactly express the sense intended. On the contrary, they were satisfied in using general expressions, which would be liquidated by judicial exposition, according to the established rules of interpretation and construction.

This circumstance is not without its influence, when we are seeking what the legislature expected from judicial consideration. Recurring to the view presented by the attorney general, it will be perceived to have a bearing not as yet noticed. According to his construction of this general clause, it could only apply, and hence was intended only to apply, to an attempt by solicitation. Now the language found in the act is very inappropriate for such a purpose, and it seems scarcely possible to suppose that if the legislature had meant to reach "solicitation," and that only, it would have chosen, in order to effectuate their object, the phrase, "any other means."

The more reasonable conclusion is altogether at variance with the view of the prosecution, and in substantial accordance with that of the plaintiff in error. If the object of the legislature had been as claimed by the prosecution, it would have been manifested in the use of suitable and explicit terms. Such terms were familiar, and a resort to them would not have multiplied

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words. In other cases, when procurement or solicitation have been contemplated as the things to be forbidden and made criminal, the legislature have employed terms plainly adapted to denote the purpose, and very different from the expression used in this law. Comp. L., §§ 7772, 7803, 7804.

On the whole, it is deemed to be very clear that in using this phrase, "any other means," the legislature did not have it in mind and did not design to denote and identify a mere invitation to burn; and looking at the enactment in connection with the provisions associated with it, and considering the subject matter and general spirit, and the recognized rule of interpretation already noticed, I think we are under the necessity of holding that this statute was intended to require some physical fact, even in cases marked by express invitation, and cannot be satisfied without some such act committed in person or through another, reaching far enough to amount to the commencement of the causation. *Regina v. Williams*, 1 Den. C. C., 39; *Regina v. Eagleton*, 33 E. L. & E., 540.

The "attempt to cause" must be by some act of the same general nature as the acts before mentioned; that is, some physical act, and sufficiently proximate to the result to be caused, as to stand either as the first or some subsequent step in the actual endeavor to really bring about or accomplish such result. It must amount to something more than a preparation for an attempt to cause. The specific provisions in the fore part of the section require a physical act of causation very near to the effect, and I can discover no ground in the subject or in the arrangement or phraseology for exempting the general clause from the rule of law before stated, by which generals are subordinated by the sense of preceding and connected particulars. If correct in this, it follows that the count on which the conviction was allowed alleged no crime in law, and that the judgment and verdict must be set aside, and the plaintiff in error be discharged from further prosecution on this information.

CAMPBELL, J., concurred.

COOLEY, J. I have not been able to concur in the view taken by my brethren of the statute under which the information was filed. The statutes provide for the punishment of "every person who shall set fire to any building mentioned in the preceding

sections, or to any other material, with intent to cause any such building to be burned, or shall by any other means attempt to cause any building to be burned;" that is to say, it provides for the punishment of every person who shall himself set a fire with the intent specified, or, on the other hand, as I understand it, shall make the same attempt by any other means whatsoever. Instead of discovering in this statute an intent that its operation shall be confined to cases in which the accused party has resorted to physical means to originate the fire himself, it seems to me that the purpose is manifest to make its scope as general as possible, and it cannot be denied that, in this case, if the facts charged in the information are true, the prisoner did resort to means to cause the building to be burned. But even on the view of the statute taken by my brethren, I should think the case within it. Furnishing a confederate with combustibles to begin a fire with, is as much a resort to physical means for the purpose, as would be the planting of a torpedo with one's own hands, with the intent that it shall explode and cause a fire.

CHRISTIANCY, J., did not sit in this case.

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### DELANEY VS. STATE.

(41 Tex., 601.)

ARSON: *Motion for new trial — Burning jail to escape.*

A prisoner who burns a hole in the floor of the lock-up for the purpose of making his escape through the hole so made is not guilty of arson.

*It seems*, that if he had set fire to the building intending to burn it up and make his escape in the confusion attendant on the burning of the building, he would be guilty of arson.

Affidavit of co-defendant, against whom there is strong evidence, is not sufficient on a motion for a new trial on the ground of newly discovered evidence.

MIKE DELANEY was tried at the February term, 1874, of the district court of Fannin county, on an indictment charging him, jointly with John Whaley, with the wilful burning of a calaboose used for confining prisoners in the city of Bonham. Late in the evening of the 17th of March, 1874, Delaney and Whaley were arrested for drunkenness, and confined in the calaboose in

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See *Jenkins v. State*, 53 Ga., 33, in which it is held that burning of jail to escape is not arson.

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Bonham during the following night. Soon after being imprisoned, Delaney, still drunk, swore that he would burn up the town of Bonham before the next Tuesday night. Late in the night of 17th March the cries of defendant were heard calling for water to extinguish fire. A fire had been kindled on the floor with the staves of a bucket, and the floor burned through. Water was handed to defendant through the grates of the prison, with which he extinguished the fire.

No witnesses were introduced for the defense. The judge, after copying in his charge the statutory definition of arson, and informing the jury that a calaboose was a public building, instructed it further, as follows: "On the trial of a criminal action, when the facts have been proved that constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission. Drunkenness is no excuse for crime. A man is always presumed to intend the natural consequences of his own act, and if you have a reasonable doubt arising from the evidence that this defendant did not wilfully set fire to the calaboose, or if he did not aid in doing so, you will find him not guilty; but if you believe that he did wilfully set fire to it, or aid in doing so, you will find him guilty as before charged."

Verdict of guilty, and punishment assessed at five years in the penitentiary.

There was a motion for new trial, supported by the affidavit of the co-defendant Whaley, to the effect that the fire was accidentally communicated to the floor from a pipe which one of the prisoners had been smoking. Motion overruled, and defendant appealed.

No briefs for appellant have reached reporters.

*George Clark*, Attorney General, for the state.

ROBERTS, C. J. We do not think the court erred in admitting the threats of defendant, "that he would burn up the calaboose and town of Bonham before the next Tuesday night," while he was imprisoned. It does not stand on the same ground of confession of having previously committed an offense made after and during his imprisonment. Nor do we think the affidavit of his co-defendant, that the burning was accidental, was a good ground for a new trial, as presented in defendant's motion, because the



facts developed on the trial did not show that there was no evidence against his co-defendant Whaley. It was nearly as strong against one of them as against the other, the threat made by the defendant on the previous evening being the only difference. The only other ground in the motion for a new trial was that the verdict was contrary to the law and evidence. Arson is the wilful burning of a house. The house need not be consumed with fire to constitute the offense. It will be sufficient to show that a person set fire to the house, to the extent that some part of the house was on fire, unless it is made clearly to appear that it was accidental, or was for some other object wholly different from the intention to burn up or consume the house. f, for instance, it appears from the evidence that a person confined in prison set fire to the door to burn off the lock so as to make his escape, or that he burned a hole in the floor or in the wall for the same purpose, it would not be arson. So it has been held by the courts of other states. *The People v. Cotteral et al.*, 18 Johns., 115; *The State v. Mitchell*, 5 Ired., 350.

If, however, a prisoner, or a number of prisoners in concert, should set fire to a jail without such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson.

In this case the evidence is circumstantial. There is no direct evidence that both or either of the two prisoners set fire to the calaboose, and the circumstances tended very strongly to show that they were endeavoring to burn a hole in the floor, so as to make their escape through it. The fire must have been burning for some time, perhaps several hours before daylight. It is not reasonable to suppose, considering the trivial importance of their offense, as indicated by their fines next day, after they were put in drunk, that they were desperate enough to intend to burn up the calaboose during the night, with themselves in it. When they gave the alarm of fire, about daylight, they did not act like persons who had set fire to the house to produce general alarm and escape in the confusion. Had that been their design, we should have reasonably expected that they would have waited until the fire had taken greater effect, and then, upon giving alarm, have let others rush into the calaboose to extinguish the

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fire, with the hope of there having been a chance to rush out. Instead of that, defendant called for water the first thing, and it being handed to him through the grated window, he put out the fire himself on the inside, and another person, crawling under the calaboose, put it out on the under side of the floor; so that the fire was entirely extinguished, and the prisoners were still in prison, when the marshal of the town came with the key, unlocked the door, went in and examined the premises in reference to the burning. There is not the least intimation on the part of any of the witnesses that they made any effort to escape. The marshal does not even state that he summoned a guard when he took them before the mayor, where they were each fined two dollars and fifty cents and discharged. The whole trial of the case seems to have proceeded upon a view of the law, that if the defendant did wilfully set fire to the calaboose, he was guilty of arson, whatever might have been his intention in doing it. The jury was instructed that: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves on the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." This charge in this shape, though its meaning may be well understood by a lawyer, may sometimes be well calculated to mislead a jury. The facts or circumstances of excuse may have been already shown by the evidence for the prosecution, and then it would not devolve on the defendant to show them. So in this case, all the witnesses that knew anything about the transaction had been examined by the state. The defendant had no means of showing anything more, as he could not put his co-defendant on the stand as a witness. The jury might have been correctly told that it devolved on defendant to show such facts, unless they appeared in the evidence of the prosecution, and then their minds would have been directed to the facts in proof, and not have been left to the possible conclusion that, as the defendant had introduced no evidence on his part, there was none favorable to him before them already for their consideration.

Another objection to this charge in reference to this case is, that it did not indicate to the jury what facts would be an excuse for wilfully setting fire to the calaboose, or, indeed, that there could possibly be any such facts. It is true that it was not incumbent on the court to indicate any such facts, if the evi-

dence did not point to them. For instance, it was not required that the court should have told the jury that if they believed the defendant, upon recovering from his drunken spell, was about to freeze, and built a little fire with the staves and hoops of the bucket on the floor to avoid that calamity, and did not design to burn the building to any dangerous extent, under the reasonable expectation of being able to control the fire, that would excuse him from the criminality of arson because there was no evidence that it was then cold, and no other evidence, tending to establish such a conclusion. But there was evidence tending to show that if the defendant wilfully set fire to the floor at all, it was done to burn a hole through it to make his escape. And the charge should, therefore, have indicated that as a fact, which, if they believed it to be true from the evidence, would be an excuse sufficient to relieve him from the charge of arson.

In reference to the facts in the evidence, all being circumstantial, the matters to be considered in coming to a conclusion were, that the floor of the calaboose was certainly on fire, and a small hole had been burned through it. The staves of the bucket were found partially burned, with the burnt ends towards and near the fire. Some coals were found under the floor, with some chips and shavings near them. There was no water left in the calaboose. The two prisoners had been put in while drunk on the evening previous, most probably only because they were drunk, and one of them noisy.

Under a view of all these circumstances, the questions presenting themselves were (as no one saw the thing done who can give evidence, if anyone did see it), Was the fire accidental, or was it set on purpose? If on purpose, was it done by defendant, or his co-defendant, in the building, or by some one under it? If done by some one in the building, was it done by both or by one, and which one? If defendant was implicated in purposely doing it, was it done to consume the building with fire, or to make a hole to get out, or was it done with a reckless disregard as to whether the building was consumed with fire or not, and for the purpose of producing alarm and confusion to facilitate their escape?

That the burning was done by the defendant, was a material fact to be found by the jury, and which was not to be taken for granted simply from the fact that he could have done it. If they had been satisfied of that fact, beyond a reasonable doubt, from

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a consideration of all the evidence, then they might have presumed that it was a wilful burning, if there was not enough evidence to satisfy them that it was not wilful, but was only accidental, or done for the purpose only of making a hole in the floor through which to escape. (As to accidental or negligent burning, see Russ. on Crimes, 549; Whart. Cr. Law, sec. 1663.)

In New York, the statute makes arson the "wilful burning," etc., as in this state.

In North Carolina, the statute makes arson the "wilful and malicious burning," etc., as at common law.

In both of those states it has been held, in well considered cases, that where it appeared reasonably certain, from all the facts and circumstances in evidence, that the purpose of the prisoner in jail in setting fire to it was only and solely to burn the lock off of the door (in one case), or to burn a small hole (in the other case) to enable him to make his escape, it would not be the wilful burning of the house as contemplated by the law of arson. They both also held that if defendant set fire to the house, he would be guilty of arson, unless it did clearly appear that his intention in doing it was only to so burn it (as above stated) as to make his escape. *People v. Cotteral et al.*, 18 Johns., 115; *The State v. Mitchell*, 5 Ired., 350.

Concurring in this view of the law, we are of the opinion that the court failed to charge the law of the case as it was required to be done by facts in evidence, for which error the judgment is reversed and cause remanded.

*Reversed and remanded.*

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#### MEISTER VS. PEOPLE.\*

(31 Mich., 99.)

ARSON: *Prosecution by private counsel—Burning insured property—Evidence—Statute construed.*

Counsel employed and paid by private parties will not be allowed to prosecute

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\* The statute on which the information in this case was based, reads as follows: "Every person who shall wilfully burn any building, or any goods, wares, or merchandise, or other chattels, which shall be at the time insured against loss or damage by fire, or shall wilfully cause or procure the same to be burned, with intent to injure the insurer, whether such person be the owner of the property or not, shall be punished by imprisonment in the state prison not more than ten years." 2 Mich. Comp. Laws 1871, sec. 7560.

in a criminal case, against the objection of the respondent, especially where the private party has a pecuniary interest in the conviction of the accused. Preliminary examinations on charges of felony may be conducted by counsel employed and paid by private parties.

In a prosecution for burning insured property with intent to defraud insurers, an actual valid insurance must be proved.

In a prosecution for burning insured property, evidence that a month before the fire the defendant wanted a witness to burn the property is admissible.

Guilty knowledge may be proved by circumstantial evidence, as well as any other fact.

Under a statute punishing those who burn insured property, and those who cause or procure it to be burned, the defendant who is charged with burning the property cannot be convicted on proof that he procured the building to be burned while he himself was absent. Burning and procuring to be burned are different offenses under the statute.

**ERROR to *Saginaw* Circuit.**

*Gaylord & Hanchett*, for plaintiff in error.

*Wisner & Draper*, for the people.

CAMPBELL, J. The respondents below were all tried and convicted of the offense of burning certain insured property, in the city of Saginaw, on the 22d day of June, 1873, with intent to defraud certain insurance companies named in the information. There was no evidence to connect Leizer Meister or William Meister with the burning, as principals present at the fact. The case proceeded throughout on the claim that Rosa Meister, the wife, and Bertha Meister, the sister of William Meister, who occupied the premises, set the property on fire in the absence of the others; and that William and his father Leizer, who lived at some distance off, procured the burning.

At the opening of the trial, an objection was made that counsel had been retained by private prosecutors, and at their expense, to aid in conducting the prosecution. Defendants offered to show this fact, and asked to have one of the assisting counsel sworn, who declined to be sworn, and the court refused to require him; and the prosecuting attorney stating the gentlemen referred to were acting at his request, the court permitted them to assist, and overruled the objection. This question has never been presented to the court before. Under the English practice, prosecutions by private parties have been the rule rather than the exception, and there is no public prosecutor who has general charge of criminal business. The necessity of such an officer

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has been urged repeatedly by many of the ablest jurists; and the chief reason suggested has been the abuse of criminal proceedings for private ends, and the subordination of public justice to private control. In this country we have usually had in every state some officer, or class of officers, appointed for the express purpose of managing criminal business; but the extent and nature of their powers and duties have not been uniform. Sometimes the officers have been permanent, and sometimes counsel have been appointed by the courts to act for the term; and the duties have often been left under vague regulations. Under our territorial statutes, and until the Revised Statutes of 1838, the legislation was not very specific. But by the Revised Statutes of 1838, a regulation was introduced that was borrowed from the laws of Massachusetts, and that has been preserved ever since. The prosecuting attorney of each county is required to prosecute all criminal cases in the courts of his county, and may be required also to appear for the same purpose before any magistrate, except in certain municipal courts. And he is expressly debarred from receiving any fee or reward from any private person for any services within his official business, and from being retained, except for the public, in any civil action depending on the same state of facts on which a criminal prosecution shall depend. C. L., §§ 529, 530, 534.

The courts may appoint counsel to act in his place when he is absent or unable to perform his duties, or where the office is vacant; but no other power of appointment is given. Any recognition of other counsel, if valid, can only be by the request of the prosecuting attorney. He cannot abdicate his duties, and the court cannot divide or relieve them, or give to any other counsel any authority whatever, independent of his responsibility. *U. S. v. Morris*, 1 Paine, 209; *Hite v. State*, 9 Yerg., 198; *Com. v. Knapp*, 10 Pick., 477; *Com. v. Williams*, 2 Cush., 582.

The question, therefore, seems to narrow itself to the inquiry, whether or not the persons allowed to act at the request or by the assent of the prosecuting attorney are subject to any restrictions applicable to him, or whether they may act without reference to their relations to private parties.

It has been quite common in this state for prosecuting attorneys to be aided by counsel, and probably in some cases they have had the help of those retained by private prosecutors. As

no objections have been taken in these cases, and no attention has been called to the statute, it cannot be said there has been any practical construction of the statute; and we are obliged to consider the case as one requiring the law to be enforced according to its fair meaning.

The mere appointment of public prosecutors is not inconsistent with private prosecutions, either separately or under official supervision. When the crown officers intervene at common law, they must, as we suppose, have control of the proceedings. The proposals in England to establish a new system, do not aim at entirely destroying the right of private prosecutions. See Edinburgh Review, No. 220, art. 2, on Criminal Procedure in England and Scotland. But so long as the present system exists, it appears to make it not only the right, but the duty of individuals, to complain of felonious crimes; and the disability against bringing private actions before prosecuting for felonies was imposed to encourage such complaints, and to ensure private diligence in bringing offenders to justice. The premiums offered to informers stand on a similar footing.

The policy of allowing *qui tam* actions has not been encouraged in this state, and criminal penalties have been devoted to public purposes. Neither is the felonious character of an injury held to prevent an action before, any more than after criminal prosecution. And one of the reasons given for this is the establishment of public prosecutors. *Hyatt v. Adams*, 16 Mich., 180.

It is impossible to account for the change in our statutes requiring the exclusive control of criminal procedure to be in the hands of public officers who are forbidden to receive pay, or in any way become enlisted in the interests of private parties, unless we assume the law to have been designed to secure impartiality from all persons connected with criminal trials. The law never has prevented, and does not now prevent, private complaints before magistrates, who have a discretion in regard to calling in the prosecuting attorney. In the ordinary course of things, the case for the prosecution is brought out on that examination, and justice requires that it should be, where a defendant does not waive examination. But when the charge is presented on which the respondent is to be tried at the circuit (where he must be tried for all statutory and common law felonies, except petit larceny), the law requires the public prosecutor

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to assume and retain exclusive charge of the cause, until the case is ended by acquittal or conviction. The chief dangers which the statute intends to guard against must be those attendant on the trial, inasmuch as the preliminary proceedings usually determine the nature and extent of the accusation, and those may be under the charge of private parties. And we must conclude that the legislature do not consider it proper to allow the course of the prosecuting officer during the trial, to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a duty of impartiality not altogether unlike that of the judge himself. We have had occasion heretofore to refer to this duty in these officers of justice. Their position is a trying one, but the duty nevertheless exists, and the law has done much to remove hindrances to its performance, and in no case more plainly than by the prohibition in question here, and that against allowing a circuit judge to act as counsel in his own court, before another judge, as was done in *Bashford v. People*, 24 Mich., 245. See, for illustrations, *Wellar v. People*, 30 Mich., 16; *Wagner v. People*, 30 id., 384; *Hurd v. People*, 25 id., 416.

The courts of Massachusetts have passed upon their statute several times. It was first brought to their attention in the case of *Commonwealth v. Knapp*, 10 Pick., 477, where it appeared that Mr. Webster had aided, without objection, in the trial of the principal felon, whose accessories were on trial, and that reliance had been had on his aid in the case at bar, and that he was acting without any pecuniary inducement.

The court, under these circumstances, holding it had a right to allow the prosecuting officer to obtain help in a proper case, considered it admissible in that instance, but reserved their opinion as to any different circumstances, and laid stress upon the absence of any interest in Mr. Webster beyond "a disinterested regard for the public good." In *Commonwealth v. Williams*, 2 Cush., 582, a similar course was sustained, but the court said it could only be allowed for stringent reasons, and referred again to the absence of any pecuniary compensation from any private individual. They said that such counsel is not under ordinary circumstances to be permitted, yet, when sanctioned by the court under the limitations suggested, it would not furnish sufficient ground for setting aside the verdict. In *Commonwealth*



*v. Gibbs*, 4 Gray, 146, a conviction was set aside because the court had, in the absence of the district attorney, appointed counsel to act in his place, who had been retained by private parties in civil litigation of the same matter. In *Commonwealth v. King*, 8 Gray, 501, a gentleman was allowed to act as counsel who had acted in aid of the prosecution on the preliminary examination, and had also sat upon a commission of inquest concerning the fire, which was the occasion of the prosecution. The court held this peculiar familiarity with the facts would make his help valuable, and no suggestion was made by any one that he was not disinterested, as no interested person, it must be supposed, would have been allowed to sit on the commission.

The supreme court of Maine in *State v. Bartlett*, 55 Me., 200, allowed Gen. Shepley to act with the prosecuting attorney, though under retainer from the insurance company at whose instance the case was prosecuted; and disposed of the Massachusetts cases by saying that in the only one where the conviction was set aside, the counsel complained of was in effect acting district attorney, and so within the words of the statute, which they held should only apply to that officer.

The Massachusetts court, in both of the earlier cases, made the absence of compensation a prominent feature, and in all the cases, spoke of the employment of associates as exceptional, and not generally allowable. They do not bear out the Maine decision in the reasoning. And that can only stand on its own reasoning, upon the assumption that the control of the prosecuting attorney will destroy any influence or mischief which might result from the private interests of his colleagues.

But a theory which holds them as any thing but his deputies, or assistants in office, would render it difficult to reconcile their appearance with the law, which compels him to conduct the prosecution. Such counsel, in the courts of the United States, are required to take the oath of office, and are made expressly public officers. 16 L. U. S., 165. The experience of trials shows that any other position is fallacious. When counsel are introduced into a cause, and aid in the trial or argument, it is little short of absurd to suppose they can be prevented from having their own way. It would be unseemly and unprofitable for one counsel, during a trial, to interfere with his associate's questions or argument; and competent auxiliaries would not be engaged on terms

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which would subject them to open slights. We must look at things as they exist, and every one knows that if a prosecuting attorney allows the counsel of private parties to intervene, it must usually be for the reason that they will save him labor, and assume the burden of the prosecution. The mischief which the law aims to avoid is, prosecution by interested parties; and if such is the policy of the law, it ought to be carried out. It does not assume that there is any thing dishonorable in such employment, but it does assume that it is not proper to entrust the administration of criminal justice to any one who will be tempted to use it for private ends, and it assumes that a retainer from private parties tends to this.

The great scandals which have occurred from the abuse of criminal process to further purposes of gain or vindictiveness have often demanded notice; and no better remedy has been suggested than the policy of our statute. It does not prevent any one from hunting up proofs, or furnishing every facility to the officers of the law. But it will be very inefficient, if it is possible to allow those who have a direct pecuniary interest in convicting a prisoner, to take an active part in his trial. Until the legislature see fit to restore the common law rule, and leave cases to private prosecutions, it must be assumed that they regard it as unsafe and opposed to even handed justice.

As the liability of the insurance companies on their policies would be avoided by proof that the property was burned by the assured, the case is one within the statute; and counsel in the interest of the insurers should not have been allowed to appear.

It appeared, on the trial, that the policies of insurance were not completed for delivery at the home office, but were sent, with printed signatures, to George A. Baker, who signed and delivered them as agent. Upon attempting to prove his agency, it appeared that the authority was written, and was not produced, and no proof was given of its contents. But the court allowed evidence of recognition to stand in lieu of proof of agency, and for that purpose testimony was introduced that the blank policies were received from a Chicago firm purporting to be general agents, but whose authority was not proved; that no losses had been paid by any of the companies at that place; that Baker and his partner made remittances, deducting their commissions, and not showing what was received on particular poli-

cies; that reports were sent with lists and particulars of policies monthly, and these were sent to the secretary, who acknowledged them. No evidence was given of the contents of any reports, or of the incorporation or existence of the companies, or that the person corresponding with Baker was secretary. The court held the evidence sufficient to go to the jury.

The statute punishes only the burning of property actually insured; and nothing but a valid insurance plainly established would suffice. And as the whole validity of these insurances depended on the authority of Baker, it was essential to show it. There was here no proof of authority from any one, and no proof of recognition by any one who was shown to be connected with and authorized to act for the alleged insurers. And there was no production of the writings relied on for recognition, nor proof of their genuineness. The case was entirely barren of all proof on the most essential part of the issue, and the court should have so ruled.

The fire was on the 22d day of June. Proof was given, under exceptions, that about a month before the fire three conversations were had between Leizer Meister and John Wagner and John Nugent (at one of which William Meister was present) in which Leizer desired to get them to burn the property between the 1st and 10th of June, between Saturday night and Monday morning, when the folks would be away; and consulted as to the best way of burning. This testimony was objected to, as tending to show another offense, under a different statute.

We think this was admissible as tending to show a purpose to burn the property, existing not very long before the fire; and bearing on the probabilities. The men were convicted on circumstantial testimony, and it was not foreign to the issue to show a previous conspiracy to burn the same property. If the jury believed this testimony, they must have found that the two Meisters desired to have the building destroyed, and this was certainly one of the elements of the crime, if a crime was committed, and one of great importance.

The bill of exceptions states that some weeks before the fire, Wagner and Nugent were arrested for burglary, and continued in jail until after the fire, and were convicted and sent to state's prison, whence they were brought to testify. It further appeared from their cross-examination that they were of infamous character.

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In order to corroborate their testimony, the jailer was allowed to swear that, during the week preceding the fire, Nugent told him that parties owning a clothing store on Water street had spoken to him and Wagner about burning it, and the night it was to be burned would be either Saturday or Sunday evening, when they would be in Bay City. He refused to give names. Also that Wagner told him a similar story, adding that the parties owned a house and barn on the Deerfield road, which they had also spoken to him about burning. This last fact was stricken out as immaterial.

This testimony was all objected to, but received.

This was not the statement which these witnesses had made on the stand. According to that, the time of burning was to have been on or about the eighth of June, and subsequent to their arrest. If they had any conversation about a fire to take place on the 22d, it must have been after their arrest, or they must have given a false account under oath concerning the talk with the Meisters. If Nevins is believed, there could be no doubt of the complicity of Wagner and Nugent in the fire; but there can be as little doubt that they made no statement on the stand showing any knowledge in advance of such an event. There is no identity in the stories, and one cannot corroborate the other. The effect of allowing this testimony would be to allow a conviction on the unsworn statements of infamous witnesses, not subject to any cross-examination upon it. If a witness can be corroborated at all by his repeated statements implicating third persons, the statements must be the same as far as they go. Upon the abstract proposition, no decision is called for. This testimony was not admissible.

It is also claimed the court erred in refusing to charge that there was no evidence on which the two women could be convicted.

In the view we have taken of the proof of insurance, there was no sufficient evidence. But the point specially aimed at was, that, assuming the insurance proved, there was no proof that the women knew of it, and had an intent to defraud the insurers.

It is admitted that there was competent proof from which the jury were at liberty to find them guilty of the burning. There was no evidence showing any knowledge of the insurance directly. But whether knowledge of a fact exists, is open to

proof by circumstances, like any other matter. If the fact is shown to exist, under circumstances likely to make it known, and persons act as they might be expected to act if they knew it, we are not prepared to hold that inferences of notice may not be drawn.

If, for example, it were shown that property is insured where a family dwell, with store and dwelling united, and it is also shown that the property is intentionally burned, it must be assumed it was not burned without some purpose. A jury might properly infer that a wife would not destroy her own or her husband's property unless by his command, or with a design to injure him or some one else. If no enmity appeared against the husband, a person must be very ignorant who would not suppose it was to conceal some fraud, or to injure some one else. And if it was likely to injure third persons it would usually do so by endangering their neighboring property, or by subjecting them to some liability contingent on the fire, which is generally on an insurance. Juries have a right to judge from the surrounding circumstances, whether parties have acted in accordance with one or another of these motives, or whether they have been ignorant tools of others; and if their conduct is such as to clearly indicate one of these motives, so as to remove all reasonable doubts, the inference is rightly drawn that there was such knowledge as would call out that motive.

We think the facts on this part of the case were properly left to the jury.

But a serious question is presented, whether the men were properly convicted under the information. They are charged with the burning directly, and not as having procured the property to be burned; while the evidence was clear that if they were guilty at all, it was by way of procurement, and that what they did was before the fire, both being absent when it happened. Our statutes having made all persons principals who would at common law have been accessories, the question arises whether this is such a case.

The position of these defendants would have been at common law that of accessories before the fact, if this burning were a common law felony on the part of the women. No one could be a principal without actual presence, near enough to aid if needed, in furthering the crime. The crime of such an acces-

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sory differs in time and may differ in venue, from that of the principal; it is not the same act, but is in the nature of a previous conspiracy to procure its commission.

Where a felony is created by statute, it depends somewhat on the terms of the statute, whether it reaches accessories or not. It is necessary, in all cases, that the accessory have the same intent with the principal. 1 Hale, p. 617, 618; Archb. Cr. Pl., 7; Russ. Cr., 35, 36; 1 Bish. C. L., § 666; and unless by virtue of some statutory provision, no one who is indicted as principal can be convicted as accessory, or *vice versa*. When a statute in general terms declares a certain act to be a felony, it will involve the consequent liability of accessories before or after the fact, where there is nothing inconsistent with that consequence. Bishop St. Cr., § 139, 142; 1 Russ. Cr. L., 34, and when a statute in terms punishes not only the principal offender, but those who would by the terms of the statute be described precisely as accessories would be at common law, the persons so described will be treated as accessories. 1 Russ., 31-2.

But a statute will nevertheless be construed by its language, and will not be extended beyond it, and it may be so drawn, and often is, as to be confined in its operation to certain persons, or persons having a certain intent or quality, and where it does this, it is enforced according to its terms.

The section of the statute under which this prosecution is brought includes two distinct offenses. The first is, where any person shall "wilfully burn insured property, with intent to defraud the insurer." The second is, where any one "shall wilfully cause or procure the same to be burned, with intent to injure the insurer." Comp. L., § 7560.

If the second offense were only that of an accessory, the whole section might be regarded as merely reaching the different actors in the same offense, and there could be no great difficulty in determining their position. But the second clause goes further, and punishes all persons who procure the fraudulent burning of insured property, whether the person doing the burning had or had not the design to defraud insurers, whatever else may have been his guilty purpose. This clause is equally applicable to all guilty procurement, whether through guilty principals or through agents who would not be principal offenders. It was evidently designed to prevent the danger of an acquittal of the guiltiest

parties, by reason of a failure to convict those who are merely their tools.

Where the statute has so definitely specified all the persons who could, under any circumstances, be guilty, and has divided them into two distinct classes, it seems to be no more than reasonable to deduce an intention to require each to be charged with his own statutory offense, in the language or substance of the statute, and not to leave it optional with the prosecutor to charge the defendants according to the facts, or against the facts by legal fiction. The danger of it appears on the present record, where it became a serious question whether the plaintiffs in error might not be entitled to an acquittal on account of the want of guilty knowledge of their co-defendants, who in turn may have been exposed to prejudice by being joined with them. If separately informed against according to the parts they are severally charged with having taken in the transaction, the issues will be more fairly presented, and the results more satisfactory.

The judgment must be reversed, and the verdict set aside, and it must be certified to the court below that there should be a new trial, but that the plaintiffs in error cannot be convicted under the information, unless they were present at the burning.

The other justices concurred.

NOTE.—At common law, all criminal prosecutions for offenses against the persons or property of individuals were set on foot and conducted by private persons. Such an one was called the *prosecutor*, and employed and paid his own counsel. By the statute, 21 Hen. VIII., cap. 11, provision was made, by virtue of which the prosecutor on a conviction for larceny obtained restitution of his goods. The statutes, 25 Geo. II., cap. 36, 18 Geo. III., cap. 19, and 7 Geo. III., cap. 64, make provisions for paying the expenses of the prosecutor in conducting *bona fide* criminal prosecutions which seemed to the trial judges meritorious. The design was to encourage private persons to prosecute to a conviction all criminal offenses of which they were the victims. And partly in order to secure this the more effectually, it was held that any private injury which amounted to a felony was merged in the felony, at least until after a criminal prosecution for the felony was had; and until such prosecution had been had, and terminated either in the conviction or acquittal of the offender, no action would lie for the private injury. 4 Black. Com., 362, 363; 1 Hill. on Torts, 60-63. But in the United States it is everywhere the policy to entrust prosecutions for criminal offenses in the higher courts to sworn public prosecutors only, whose duty it is to see that justice is honestly and impartially administered. And it is generally the policy of the law to surround them with such restrictions and safeguards as will prevent their being influenced by any interested or improper motives. The general scope of the duties of a public prosecutor, and of counsel associated with him, is ably discussed by Mr.

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Bishop in 1 Bish. Crim. Proceed., sec. 988, *et seq.* It is certainly more conducive to justice, that the counsel in charge of a criminal prosecution should be responsible only to the public, and that he should be in no wise under the influence of private or injured parties, who often seek, under the cover of the criminal law, to extort private redress or gratify personal malice. In accord with our general policy, it is now the better opinion that there is no longer any merger of a private injury in a felony, nor is the private remedy suspended until a criminal prosecution has been had. See 1 Hill. on Torts, ch. II, sec. 8; *Boston v. Dana*, 1 Gray, 83; *Hyatt v. Adams*, 16 Mich., 180.

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ISAACS VS. STATE.

(48 Miss., 234.)

CONSPIRACY: *Practice.*

On an indictment for conspiring to defraud, it is not necessary to allege or prove that the fraud was successful. The act of conspiracy is an offense of itself, though the fraud be never consummated.

Where there is a joint verdict and judgment against several, which is erroneous as to one, against whom there was no evidence, the judgment must be reversed as to all. A *nolle prosequi* should have been entered as to the one against whom there was no evidence, or a verdict of acquittal rendered in his favor.

TARBELL, J. N. Isaacs, M. Wolfe, A. Cohen and A. Lewis were jointly indicted in the Warren county circuit court, in 1871, for a conspiracy to cheat and defraud Herman & Moss, and I. Rheinhart, merchants of Vicksburg, of their personal property, viz.: goods, wares and merchandise. After arraignment and plea, there was a motion to quash the indictment on the ground that it "does not allege that the property mentioned was obtained by the prisoners or either of them;" that it "does not state that the property was obtained by prisoners, or any of them, by reason of false pretense, nor is the character of the false pretense stated;" and, that it "is vague and uncertain, and does not state with clearness the ownership of the property." The record does not show a decision of this motion, and presumptively it was waived. As to this indictment, we refer to Wharton's Am. Cr. Law, title, Conspiracy; Wharton's Forms and Precedents, title, Conspiracy, and to Bishop on Cr. Law, vol. 2, Conspiracy, with the remark that it is for the conspiracy, and not for obtaining property. The trial in 1872 resulted in a verdict of guilty against all the defendants. There was a motion for a new trial on the following grounds: Error in giving the instruction for the state, and in



refusing the second instruction for the defendants; the jury disregarded the instructions; the verdict is unsupported by the evidence, and misconduct of the jury during the trial, which motion was overruled. The judgment and sentence of the court was as follows: "It is, therefore, considered by the court, that for the crime of conspiracy of which they stand convicted, they be sentenced to imprisonment in the county jail of Warren county for the term of one day, and each of them be fined \$50, and they pay the costs of this suit." Thereupon, the accused prosecuted a writ of error to this court, and assigned thereon the following causes of error: In giving the instruction for the state; in refusing the second instruction for the accused; in refusing to quash the indictment; in overruling the motion for a new trial; the insufficiency of the indictment, and verdict unsupported by evidence.

The single instruction for the state is drawn with rare accuracy, stating the rule of law and the facts necessary to constitute the crime of conspiracy, and clearly and impartially submits to the jury the question for their consideration.

The instruction for the accused refused by the court was not applicable to the charge of conspiracy, but to a prosecution for obtaining goods by false pretenses. The act of conspiracy is an offense of itself, though the fraud be never consummated. Am. Cr. Law and Bishop Cr. Law, *supra*. Upon all other points the instructions for the accused were full, and considerate of their rights.

Upon an examination of the evidence sent up with the record, we are clearly of opinion that the verdict against Isaacs is wholly unwarranted. Either a *nolle prosequi* should have been entered as to him, or he should have been acquitted by the jury. For this manifest error, the judgment will be reversed. The defendants having been jointly indicted and convicted, the judgment must of necessity be reversed as to all. As to the others, however, the jury would seem to have been authorized to infer a conspiracy from the evidence as to them, though it is not our purpose to express any opinion of their guilt or innocence, or of the weight of the testimony. If truthfully represented, the conduct of Wolfe, Cohen and Lewis was disgraceful. For the verdict against Isaacs, however, the judgment is reversed, and the cause remanded, with a *venire de novo*.

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## LANDRINGHAM vs. STATE.

(49 Ind., 186.)

CONSPIRACY: *Constitutional law — Indictment.*

It is not necessary to constitute the offense of conspiracy that any act should be done in pursuance of the conspiracy.

A proviso in a criminal statute against conspiracy which reads as follows: "Provided, that in any indictment under this section it shall not be necessary to charge the particular felony which it was the purpose \* \* to commit," is unconstitutional and void.

An indictment for conspiracy to commit robbery which charges an intent to "forcibly and feloniously take from the person of A. B.," but does not charge that it was to be done "by violence," or "by putting in fear," is insufficient.

BUSKIRK, C. J. The appellant was indicted and convicted under the following statute:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony, or any person or persons who shall knowingly unite with any other person or persons, or body, or association or combination of persons, whose object is the commission of a felony or felonies, shall be guilty of a felony and upon conviction shall be fined in any sum not exceeding five thousand dollars, and be imprisoned in the state prison not less than two nor more than twenty-one years; provided, that in any indictment under this section, it shall not be necessary to charge the particular felony which it was the purpose of such person or persons or the object of each [such] person or persons, or body, association or combination of persons to commit."

The indictment was as follows:

"The grand jurors for the county of Marion, and state of Indiana, upon their oaths present that James Landringham, on the 12th day of November, A. D. 1874, at and in the county of Marion, and state aforesaid, did unlawfully and feloniously unite, combine and conspire with Thomas King, for the purpose of making an assault upon one Thomas J. Barlow, and for the purpose and with the intent then and there of feloniously and forcibly taking from the person of the said Barlow ten United States treasury notes, of the denomination of two dollars each, and of

the value of two dollars each, ten national bank notes of the denomination of ten dollars each and of the value of ten dollars each, twenty United States treasury notes of the denomination of five dollars each and of the value of five dollars each, and twenty national bank notes of the denomination of five dollars each and of the value of five dollars each, all of said notes being the personal goods of said Barlow, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

Motions were made and overruled to quash the indictment and in arrest of judgment, and these rulings are assigned for error, and present for our decision the question, whether the indictment is sufficient. If the above quoted act is valid in all of its parts, then it was not necessary to charge, or even to name, the felony intended to be committed; for it is expressly declared in the proviso that it shall not be necessary to charge the particular felony which it was the purpose of such person or persons, or the object of such person or persons, or body, association or combination of persons to commit. We are very clearly of the opinion that the proviso is in conflict with the constitution, and against natural right, and hence is absolutely void. If the indictment need not charge the particular felony intended to be committed, the accused would have no means of knowing, before the trial commenced, what offense he was charged with, and consequently would have no opportunity of preparing for his defense. The question was so fully considered in this court in the case *McLaughlin v. The State*, 45 Ind., 338, that we do not deem it necessary to reargue or restate it.

The proviso being void, it was necessary for the indictment to charge the particular felony which the appellant had conspired, united or combined to commit; and this leads us to inquire whether the indictment does properly charge any particular felony. It obviously would not be sufficient to name the particular felony intended, but the indictment should contain averments sufficient to show what particular felony the accused had united and combined to commit. The averments should be as specific and full as in an indictment charging the commission of such felony. It was evidently the purpose of the draughtsman to charge the appellant with uniting and combining with Thomas King to commit a robbery, but we think such offense is not suf-

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ficiently charged. The statute thus defines the crime of robbery: "Every person who shall, forcibly and feloniously, take from the person of another any article of value by violence, or putting in fear, shall be deemed guilty of robbery." 2 G. & H., 442, sec. 18. The indictment should have used the words, "by violence" or "putting in fear." Bicknell Crim. Prac., 319; 2 Arch. Crim. Pr. & Pl., 417, 418; *Seymour v. The State*, 15 Ind., 288.

It is contended by counsel for appellee that the use of the word "forcibly" dispenses with the use of the words "by violence" or "putting in fear." The statute and approved forms use both words, "forcibly," and "by violence."

The court instructed the jury that it was unnecessary for the indictment to charge any particular felony which the appellant had united and combined to commit. The jury must have understood from such charge that it was not necessary for the state to prove any particular felony.

The appellant asked the court to charge the jury that there could be no conviction unless it was proved that he had committed some overt act to carry out the purpose contemplated by the conspiracy. It is well settled, that it is not necessary, to constitute the offense of conspiracy, that any act should be done in pursuance of the conspiracy. See 4 Chitty's Blackstone, top p. 98, side p. 136, and note 31, and authorities there cited.

The judgment is reversed, with costs; and the cause is remanded for further proceedings in accordance with this opinion; and the clerk will give immediately the necessary notice for the return of the prisoner.

## PEOPLE vs. WILSON.

(64 Ill., 195.)

CONTEMPT: *Newspaper article — Liability of proprietor of newspaper — Liability of managing editor — Publication as to pending case.*

A newspaper article concerning a criminal case pending before the supreme court which prophesies that the prisoner will get a new trial and eventually escape justice, because \$1,400 is enough now-a-days to purchase immunity from the consequences of any crime, and that "the courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood, spilled by the hands of other men," is a contempt of court of flagrant character, and calculated to

embarrass and obstruct the administration of justice. SCOTT and SHELDOX, JJ., dissenting.

Under a statute that "the said court shall have power to punish contempts offered by any person to it while sitting," the court has power to punish for a constructive contempt committed by a newspaper article referring to a case then pending before the court. All acts calculated to impede, embarrass or obstruct the court in the administration of justice should be considered as done in the presence of the court.

*It seems* that the court would have no right to punish any criticism on its decisions or official conduct in regard to cases that are ended, so long as its action is correctly stated and its official integrity is not impeached.

The proprietor of a newspaper may be punished for contempt for an article published in the newspaper owned by him, although such article was published without his knowledge and consent, when, to a rule to show cause why he should not be punished, he makes no defense as to matters of fact, except that he did not know or sanction it before publication.

The managing editor of a newspaper may be punished for contempt for permitting the publication of a newspaper article, which, although not written by him, was seen by him before publication, and which he had power to exclude from the paper.

ON a rule to show cause why an attachment should not issue against the respondents for a contempt, if the respondents rely on an excuse only, they should appear in person. If they appear by attorney, and defend on legal grounds, an excuse can only be regarded in mitigation of punishment, and not as ground for discharging the rule.

THIS was a proceeding in the name of *The People v. Charles L. Wilson and Andrew Shuman*, the publisher and editor of a newspaper published in the city of Chicago, called the "Chicago Evening Journal," for an alleged contempt of this court, in the publishing in said newspaper, on the 16th day of October, 1872, during the sitting of said court at the September term, 1872, thereof, of an article which appeared as an editorial in said newspaper, in reference to the case of *Christopher Rafferty v. The People*, which was then pending, on writ of error, in this court. The article referred to is set forth in the following information, presented to the court by the Attorney General, on the 23d of October, 1872:

"STATE OF ILLINOIS — *Supreme Court* — ss.

"*Northern Grand Division* — *September Term, A. D. 1872.*

"THE PEOPLE OF THE STATE OF ILLINOIS vs. CHARLES L. WILSON  
AND ANDREW SHUMAN.

"INFORMATION — And now come the said People, by Washington Bushnell, Attorney General, and represent to the court

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that on the 16th day of October, A. D. 1872, there was, and still is, pending in this court, a certain cause for the adjudication and determination of this court, wherein one Christopher Rafferty is plaintiff in error, and the People of the State of Illinois are defendants in error, and that, on the same day there was published in the city of Chicago, in said state, a certain daily newspaper, called the 'Chicago Evening Journal,' of which said paper on said day the said *Charles L. Wilson* was proprietor, and the said *Andrew Shuman* was editor, and that said *Charles L. Wilson* and *Andrew Shuman*, on the said day, caused to be published in said paper, of and concerning said cause so pending in this court, and of and concerning this court and its supposed action with reference to said cause, a certain article, in the words following, that is to say:

"THE CASE OF RAFFERTY. At the time a writ of supersedeas was granted in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court and decided at once; that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff, who contributed fourteen hundred dollars to demonstrate that hanging is played out, may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out, and this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough now-a-days to enable a man to purchase immunity from the consequence of any crime. If next winter's session of the legislature does not hermetically seal up every chink and loophole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our modes of procedure in murder trials. The criminal should be tried at once, and when found guilty, should be hanged at once and the quicker hanged the better. The courts are now

completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found.'

"Wherefore the said attorney general, for and on behalf of the said people, moves this court for rule upon the defendants Charles L. Wilson and Andrew Shuman, to be and appear before this court, on a day to be named, and show cause, if any, they, or either of them have, why an attachment should not issue against them for contempt of this court in respect to the publication of said article. WASHINGTON BUSHNELL, *Att'y Gen'l.*"

Afterwards, on the 25th day of the same month of October, a rule was entered of record, requiring the said Charles L. Wilson and Andrew Shuman on or before the coming in of the court on the first day of November next following, to show cause, if any they should have, why an attachment should not issue against them, for a contempt of this court, in the publishing of the article mentioned. Accordingly, in obedience to such rule, on the said first day of November, there was filed in behalf of the respondent Wilson the following answer:

"And now comes Charles L. Wilson, one of the above respondents, in obedience to the rule heretofore, to wit: on the 25th day of October A. D. 1872, entered in said court, requiring this respondent and Andrew Shuman to show cause why an attachment should not issue against them, for a contempt of said court, on account of the matters and things in a certain information filed in said court, in said rule mentioned, and in answer to the said rule, this respondent says, that he is the sole proprietor of the said newspaper, mentioned in the said information, called the Chicago Journal, and that the article set forth in said information was published therein on the 16th day of October, 1872, but this respondent says that neither before, nor at any time of the publication, had he any knowledge or information relative to the same. This respondent did not know before said paper in which the article appeared was published, that said article, or any article upon the subject, was written, or to be written, or that any article upon the subject was to be published, and that he neither advised, or counseled, nor was he advised or counseled with by any person whatever, relative to the publication of said article, or any article whatever upon the subject.

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"This respondent further says, that the first knowledge or information he had relative to said article, on its publication, was when he read the said article in said paper, after its publication and distribution.

"This respondent further says, that he is informed and believes that no disrespect was intended by said article to said court, or to any judge thereof, and that a fair construction thereof will not warrant an inference to that effect.

"This respondent is advised and believes, that the publication of said article was not designed, and had no tendency to impede, embarrass or obstruct the administration of justice in said court. And this respondent does, and will insist that he had and still has the right, through his said paper, by himself or his agents, to examine the proceedings of any and every department of the government of this state, and that he is not responsible for the truth of such publication, nor for the motives with which they were or are made by the summary process of an attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice.

"This respondent further says, that such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same.

"This respondent takes this occasion to renew his repeated expressions of confidence in the ability and integrity of said court, and of the individual members of the same, and as evidence of the same gives the following article, which was published in said paper, issued on the 26th of September, 1872; that is to say: 'The supreme court of Illinois, although, perhaps, too ready to grant motions for supersedeas, has no sympathy with criminals. The judges are all men infinitely above such suspicions. It is their business to examine every case appealed to them, without any bias one way or the other, taking note solely of the facts presented in each case. The question for the higher court to decide is this: Did the accused, from first to last, have a fair trial? The presumption is that he did, and the rule is to grant a supersedeas only in case it is clear that he did not have a fair trial. While we cordially commend the zeal of the prosecuting attorney and of our courts in their efforts to check the appalling frequency of murders in this city and county, we suggest to them more caution in observing all the forms and technicalities of the law in



the conduct of future murder trials. The supreme court will certainly continue to insist upon it, and every supersedeas granted acts as a premium upon murder.'

"This respondent further says, that at the time of the publication of said article first mentioned, there was an intense excitement in the community, and particularly in the city of Chicago, on account of frequent murders, and the escape of the perpetrators thereof; and this respondent is informed and believes that the design of said article was to impress upon the community the importance of electing members of the next general assembly of this state, who would remedy the defects in the criminal law of this state, by which criminals are able to escape punishment, and not to reflect upon the ability or integrity of said court, or any member thereof, nor to impede, embarrass or obstruct the administration of justice. Wherefore, this respondent prays that the said rule, as against him, may be discharged.

"CHARLES L. WILSON."

"STATE OF ILLINOIS — *Cook County* — ss.

"Charles L. Wilson, being duly sworn, says he is one of the respondents named in the foregoing answer, and that the matters stated in said answer are true.

CHARLES L. WILSON."

"Subscribed and sworn to before me this 29th day of October, 1872.

HENRY W. FARRAR,

"Notary Public."

And on the same first day of November, the following answer was filed in behalf of the respondent Shuman:

"And now comes Andrew Shuman, one of the respondents, in obedience to the rule heretofore, to wit, on the 25th day of October, 1872, entered in said court, requiring the respondent and Charles L. Wilson to show cause why an attachment should not issue against them, for a contempt of said court, on account of the matters and things alleged in a certain information filed in said court, in said rule mentioned, and in answer to said rule this respondent says, that he is managing editor of said newspaper, mentioned in the said information, called the Chicago Journal, and that the article set forth in said information was published therein on the 16th day of October, 1872.

"But this respondent says that said article was not written by him, nor by his procurement or advice, but by an assistant editor of said newspaper, which said article was submitted to this re-

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spondent for his examination before the same was published, as are all articles prepared for publication in said paper. Upon the submission of said article to this respondent, he read the same, and allowed it to be published without dissent on his part, and without supposing that there was anything in it disrespectful to, or in contempt of, said court, or of any of its judges or officers. The wording and expressions of said article were, as this respondent then believed and still believes, designed and intended to impress upon the public, and upon the next legislature of this state, the necessity of such a change in the laws regulating and governing the trial of persons accused or convicted of crime, as to ensure a more speedy and certain punishment, and that this was the only aim, purpose or intention of said article.

"This respondent further says, that a fair construction of said article will not warrant an inference that any disrespect was intended by the same to the said court, or any judge thereof. This respondent is advised and believes, that the publication of said article had no tendency to impede, embarrass, or obstruct the administration of justice in said court; that it was not so designed, and had not that tendency. And this respondent does, and will insist, that he had and still has the right, as managing editor of said paper, to examine the proceedings of any and every department of the government of this state, and that he is not responsible for the truth of said publication, nor for the motives with which they were or are made, by the summary process of an attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice.

"This respondent further says, that such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same.

"This respondent takes this occasion to renew his repeated expressions of confidence in the ability and integrity of said court, and of the individual members of the same, and as evidence thereof, gives the following article, which was published under his supervision, in said paper, issued on the 26th day of September, 1872, that is to say:

"The supreme court of Illinois, although, perhaps, too ready to grant motions for supersedeas, has no sympathy with criminals. The judges are all men infinitely above such suspicion. It is their business to examine every case appealed to them, without

any bias, one way or the other, taking note solely of the facts presented in each case. The question for the higher court to decide is this: Did the accused, from first to last, have a fair trial? The presumption is that he did, and the rule is to grant a supersedeas only in case it is clear that he did not have a fair trial. While we cordially commend the zeal of the prosecuting attorney, and of our courts, in their efforts to check the appalling frequency of murders in this city and county, we suggest to them more caution in observing all the forms and technicalities of the law in the conduct of future murder trials. The supreme court will certainly continue to insist upon it, and every supersedeas granted acts as a premium upon murder.'

"This respondent further says, that at the time of the publication of said article, first mentioned there was an intense excitement in the community, and particularly in the city of Chicago, on account of the frequent murders, and the escape of the perpetrators thereof, and this respondent is informed, and believes, and so he understood at the time, that the design of said article was to impress upon the community the importance of electing members to the next general assembly of this state, who would remedy the defects in the criminal laws thereof, by which criminals are able to escape punishment, and not to reflect on the ability or integrity of said court, or any member thereof, nor to impede, embarrass or obstruct the administration of justice.

"Wherefore this respondent prays that said rule, as against him, may be discharged. ANDREW SHUMAN."

"STATE OF ILLINOIS — Cook County — ss.

"Andrew Shuman, being duly sworn, says he is one of the respondents named in the foregoing answer, and that the matters stated in said answer are true. ANDREW SHUMAN."

"Subscribed and sworn to before me this 31st day of October, 1872. CYRUS J. CORSE, Notary Public."

Mr. *Washington Bushnell*, Attorney General, for the people:

I desire, in this case, respectfully to call the attention of the court to the following authorities, which, in my judgment, are conclusive upon the question of the power of this court to issue a writ of attachment against the respondents, for the publication of the matters and things contained in the information herein filed.

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marks in a newspaper, which have a tendency to prejudice the public with respect to the merits of a cause depending in court, and to corrupt the administration of justice. 4 Black. Com., 286; *Ex parte Biggs*, 54 N. C., 202; id., 398; 1 Dall., 319.

A publication pending a suit, reflecting on the court, the parties to the suit, the witnesses, the jurors or the counsel, is a contempt of court. *Hollingsworth v. Duane*, Wall., 77, 102; *Bronson's Case*, 12 Johns., 460; 4 Black. Com., 286.

The publication of a paper to prejudice the public mind in a cause depending is a contempt, if it manifestly refer to the suit, though it do not expressly appear on the face of the writing. *Respublica v. Passmore*, 3 Yates, 438.

Denying any criminal or disrespectful design, in publications reflecting on the proceedings before the court, will not justify the party, if they appear to the court to amount to a contempt. *People v. Freer*, 1 Caines, 458, 518.

The provision in the constitution of the United States, that the trial of all crimes shall be by jury, does not take away the right of courts to punish contempt in a summary manner. The provision is to be construed to relate only to those crimes which by our former laws and customs had been tried by a jury. *Hollingsworth v. Duane*, Wall., 77, 106.

The House of Representatives of the United States may punish persons not members thereof for contempt. *Anderson v. Dunn*, 6 Wheat., 204.

This power is also incident to courts of law and equity. *Mariner v. Dyer*, 2 Greenl., 165; *State v. White*, Charl., 136; *Yates v. Lansing*, 9 Johns., 395; 6 id., 337; 4 id., 316; Trial of Smith & Ogden, 73; *State v. Tipton*, 1 Blackf., 166; 1st Burr's Trial, 352; *Clark v. People*, 1 Breese, 266; 8 Conn., 379; *United States v. Hudson*, 7 Cranch, 32; see 1 Kent's Com., 3d ed., 300 (note B). See also the case of *State v. Mathews*, 37 N. H., 453, and authorities there quoted.

In the celebrated case of *The Commonwealth v. John Dandridge*, 2 Va. Cas., 414, the court say: "They cannot but feel it a delicate task to define and decide upon the extent of their own powers, nor be ignorant that the judgment they are called upon to render may expose them, on the one hand, to the imputation of timidity and irresolution, or on the other, to that of usurpation and tyranny. The verity of these suspicions

would not be more unworthy of the judges than the fact of their shrinking from this question, because of the consequences in which themselves might be involved in it. \* \* \* In this country we know of no privileges but such as exist for the public good. Many such privileges we have, from those which appertain to the legislature itself down to such as belong to the lowest executive officer. Those which surround the administration of justice belong to the same order. Courts, their officers and process, are shielded from invasion and insult, not from any imaginary sanctity in the institutions themselves or the persons of those who compose them (as in the political and ecclesiastical establishments of another hemisphere) but solely for the purpose of giving them their due weight and authority, and to enable those who administer them to discharge their functions with impartiality, fidelity and effect.

"This is the true test of every privilege not granted by statute, and is the spirit of every one (not merely private) which is so secured. The political character of the judiciary, and the tendency of the duties which are devolved upon it, have rendered it necessary to invest it with a considerable share of these privileges.

"It is confessedly the weakest branch of all governments, wielding neither wealth, force nor patronage. Its duties consist in adjusting and settling the contested rights of individuals, in controlling their turbulence and punishing their crimes. These duties are often of a severe and rigorous character, and they are generally to be discharged in almost immediate contact with those on whom they act. Their exercise will frequently elicit the angry passions, or excite unworthy and sinister attempts to bias or avert their operation, and where there is little real power and no patronage, a certain degree of external dignity may have been considered necessary to supersede a too frequent resort to the actual powers of the courts."

In 4 Blackstone, 283, that writer says: "The contempts that are thus punished are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside, etc;" and on page 285, in enumerating the contempts which degrade the judicial authority, he refers to one which consists "in speaking or writing contemptuously of the court or judges acting in their judicial capacity."

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If the matters complained of arise at a distance, of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, it will in its discretion award the proper process to bring the party before it, of which process of attachment is one. 2 Va. Cas., p. 436.

That to scandalize a court by speaking or writing, either in its presence or absence is a high contempt. Let the judges of a court be proclaimed in public print as corrupt cowards, when acting in their judicial capacity, and how long will it be before such judges and the courts held by them will be covered with opprobrium and contempt? Id., 436.

It is a high contempt, punishable as aforesaid, to publish, by speaking or writing, anything during the pendency of a particular cause in any such court, by which an imputation is cast upon the judges, or any one of the judges, as to their purity, impartiality or integrity as respects that cause. *Commonwealth v. Danbridge*, 2 Va. Cas., 436; 2 Atkyns; *Oswald's Case*, and the case of *The King v. Barber*, Strange, 411.

I do not desire to enter into any extended argument upon the merits of this application for a writ of attachment, and therefore content myself by referring this honorable court to the above authorities.

*Beckwith, Ayer & Kales*, for the respondents.

LAWRENCE, C. J. The respondents, Charles L. Wilson and Andrew Shuman, have been placed under a rule to show cause why an attachment should not issue against them for contempt. The information filed by the attorney general, upon which the rule was made, sets forth that one of the respondents is the proprietor, and the other chief editor, of a newspaper published in the city of Chicago, called the "Chicago Evening Journal," and presented as a ground for this proceeding an editorial article published in that paper on the 16th day of October. The article is set out at length in the information. It is entitled "The Case of Rafferty." Rafferty had recently been tried for murder, in Cook county, found guilty, and sentenced to death. A writ of error, staying the execution of the sentence until the further order of this court, had been granted, and this writ of error was pending and undetermined before us at the date of the publication. The article published is as follows:

"THE CASE OF RAFFERTY. — At the time a writ of supersedeas was granted, in the case of the murderer Chris. Rafferty, the public was blandly assured that the matter would be examined into by the supreme court, and decided at once — that possibly the hanging of this notorious human butcher would not be delayed for a single day. Time speeds away, however, and we hear of nothing definite being done. Rafferty's counsel seems to be studying the policy of delay, and evidently with success. The riff-raff who contributed fourteen hundred dollars to demonstrate that 'hanging is played out' may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out. And this, in spite of all our public meetings, resolutions, committees, virtuous indignation, and what not. And why? Because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime.

"If next winter's session of the legislature does not hermetically seal up every chink and loop hole through which murderers now escape, it will deserve the bitter censure of every honest man in Illinois. We must simplify our mode of procedure in murder trials. The criminal should be tried at once, and when found guilty should be hanged at once — and the quicker hanged the better.

"The courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood spilled by the hands of other men. All this must be remedied. There can be found a remedy, and it must be found."

To the rule granted upon the motion of the attorney-general, the respondents have severally answered under oath. They have declined to argue the case, either orally or in writing, though opportunity has been allowed for that purpose.

The respondent Wilson admits, in his answer, that he is the proprietor of the newspaper, but denies all knowledge of the article prior to its publication. While this fact should influence the degree of the punishment to which he may be liable, it does

not exonerate him. He admits in his answer, in the article, that it is to be a disreputable transaction of the procedure, and a character with which he is not connected.

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tion a "impeachment. If, on the other hand, understood the publication, sail the passion, ment f explained, embarras, manner, answer, that the swearing.

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not exonerate him from responsibility. The respondent Shuman admits he is the editor in chief. He denies the authorship of the article, but says he read it before its publication, and permitted it to be published. Both respondents disavow any intentional disrespect to the court, or any design to embarrass the administration of justice, and insist that they have the right to examine the proceedings of every department of the government of this state, and that they are not responsible, in a proceeding of this character, for the truth of their publications, or for the motives with which they may be made, "save when such publications impede, embarrass or obstruct the administration of justice."

They state, under the solemnities of an oath, as a fact within their personal knowledge that "such has been the established law of this state for over thirty years past, and that said court has no judicial power to change the same." Such a sworn statement, as to the law of contempt applicable to newspaper publications, is somewhat remarkable. If we give to the saving clause, in their answers, the interpretation which it was possibly designed to bear, the statement may be accepted not merely as a truth, but as a truism. The only ground for pronouncing any act or publication a contempt of court is, that it tends in its final results to "impede, embarrass, or obstruct the administration of justice." If, on the other hand, the respondents designed to say, or to be understood as saying, that they are privileged to make any publications concerning proceedings in court, however false, to assail the integrity of the court, or to endeavor to inflame popular passion concerning cases before it, and not be liable to attachment for contempt, unless it appear that the publication complained of really has the actual and visible effect of impeding, embarrassing or obstructing the administration of justice, in a manner susceptible of proof as an accomplished fact — if the answers are to be understood in this sense, it is to be regretted that the respondents were not better advised as to the law, before swearing what the law is.

The revised code of 1845, in speaking of the supreme court, contains the following provision: "The said court shall have power to punish contempts offered by any person to it while sitting." This act has never been repealed or modified.

In the case of *Stuart v. The People*, 3 Scam., 405, decided in 1842, a similar provision in the statute of 1829, in regard to cir-



cuit courts, came before this court for construction. The court, after saying that the statute might, with great propriety, be regarded as a limitation upon the power of the court to punish for any other contempts than those committed in its presence, add the following most significant and important qualification: "In this power would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court."

The respondents evidently had this case before them when their answers were drawn. They use its language, with the exception of a most material word, which changes the meaning of the entire sentence. The respondents say the rule is, that publications are a contempt only when they impede, embarrass or obstruct the administration of justice. The rule laid down by this court was that they are a contempt when they are calculated to have that effect. The difference is radical, and marks precisely the difference between the guilt or innocence of the respondents in this case. They swear to a rule which would require us to say that we have actually been impeded, embarrassed or obstructed in the administration of justice, before we can hold the respondents guilty of contempt. The true test is, not whether the court has been weak or base enough to be actually influenced by a publication, but whether it was the object and tendency of the publication to produce such an effect.

It need hardly be said that we can not accept, as a reason for discharging the rule, the disclaimer in the answers of any intentional disrespect or any design to embarrass the administration of justice. The meaning and intent of the respondents must be determined by a fair interpretation of the language they have used. They cannot now escape responsibility by claiming that their words did not mean what any reader must have understood them as meaning.

No candid man can deny that the article in question was well calculated to make upon the public mind the impression that the court, in a pending suit, was influenced by money in its judicial action, and that it could be so influenced in other cases. Neither can it be denied that the article seeks to intimidate the court as to the judgment to be pronounced, in a case then pending, and involving the life or death of a human being. The

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article declares that the money raised for Rafferty "is operating splendidly;" predicts that he will be granted a new trial, and avers that "the sum of fourteen hundred dollars is enough now-a-days to enable a man to purchase immunity from the consequences of any crime," and that "the courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession." This language will bear but one interpretation.

I shall not stop to cite and discuss the authorities bearing on the law of contempt, as that labor has been performed by another member of the court; I merely quote the rule as laid down by Bishop, an American writer, in his work on Criminal Law, section 216. He uses the following language: "According to the general doctrine any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits and to corrupt the administration of justice, or which reflects on the trial or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt." Whether tested by this common law definition or by the rule laid down by this court in the case of Stuart, already cited, there is no room for doubt that the article in question must be held a contempt of flagrant character. It related to a case in court involving in its final issues a human life. The answers of the respondents state that at the time of the publication "there was intense excitement in the community, and particularly in the city of Chicago, on account of the frequent murders, and the escape of the perpetrators thereof." This, no doubt, is true, and this article seems to have been studiously written, with a view to direct popular clamor against this court, and compel it either to affirm the judgment sending Rafferty to execution, or incur the imputation of bribery and the clamor of an angry city to be echoed throughout the state by a portion of the Chicago press. The demand was not that we should calmly examine the record of Rafferty's trial to see whether his conviction had been legal, but that we should give him over to execution, because there was such impunity for crime in the city of Chicago that it was necessary some man should be immediately hung. We have since examined the records of this man's conviction, and reversed the judgment, all the

members of the court holding that a plain provision of the statute had been violated on his trial.

Let us say here, and so plainly that our position can be misrepresented only by malice or gross stupidity, that we do not deprecate, nor should we claim the right to punish, any criticism the press may choose to publish upon our decisions, opinions or official conduct in regard to cases that have passed from our jurisdiction, so long as our action is correctly stated, and our official integrity is not impeached. The respondents are correct in saying in their answers that they have a right to examine the proceedings of any and every department of the government. Far be it from us to deny that right. Such freedom of the press is indispensable to the preservation of the freedom of the people. But certainly neither these respondents nor any intelligent person connected with the press, and having a just idea of its responsibilities as well as its powers, will claim that it may seek to control the administration of justice or influence the decision of pending causes.

A court will, of course, endeavor to remain wholly uninfluenced by publications like that under consideration, but will the community believe that it is able to do so? Can it even be certain in regard to itself? Can men always be sure of their mental poise? A timid man might be influenced to yield, while a combative man would be driven to the opposite direction. Whether the actual influence is on one side or the other, so far as it is felt at all, it becomes dangerous to the administration of justice. Even if a court is happily composed of judges of such firm and equal temper that they remain wholly uninfluenced in either direction, nevertheless a disturbing element has been thrown into the council chamber, which it is the wise policy of the law to exclude.

Regard it in whatever light we may, we can not but consider the article in question as calculated to embarrass the administration of justice, whether it has in fact done so or not, and, therefore, as falling directly within the definition of punishable contempts, announced by this court in the case of *Stuart v. The People*. It is a contempt, because, in a pending case of the gravest magnitude, it reflects upon the action of the court, impeaches its integrity, and seeks to intimidate it by the threat of popular clamor.

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It may be said that, as long as the court was conscious it had not been frightened from its propriety by the article in question, the wiser course would have been to pass it by in silence.

So far as we are personally concerned, we should have preferred to do so. We desire no controversy with the press. But a majority of the court were of opinion that this publication could not be disregarded without infidelity to our duty. But by our relations to the bar, to the suitors in our court, to the entire judiciary of the state, and to the state itself, we felt constrained to call the persons responsible for this publication to account.

It may further be said that this article could do no permanent injury to a court strong in the consciousness of its own integrity, and in the confidence reposed in it by the people, and, therefore, the publication was unworthy of notice. It is quite true that a solitary paragraph, under ordinary circumstances, would have probably been innocuous. It is to be observed, however, that the answers of the respondents speak of the existing excitement in Chicago in regard to unpunished crime, and in that state of the public mind there was great probability that this article would win a ready credence if permitted to go unchallenged. Public meetings had been held, committees had been appointed to aid in the suppression of crime. The papers of Chicago, circulating throughout the state and the northwest, had called attention to this subject. It was made a frequent topic of discussion in the public prints, and when, finally, this article appeared, in a paper of noted sobriety and respectability, containing charges and imputations against this court, which were simply infamous, the majority of the court felt that it was necessary for the good name of the state, within and without its borders, and necessary in order to preserve the confidence of the people wholly unshaken in this court, to request the attorney general to move for a rule against these respondents. The majority of the court still think they have acted wisely. We have been controlled by no feeling of personal malignity, and do not propose to inflict a severe punishment. We wish to call the attention of the press to the limits which circumscribe their comments on judicial proceedings, and to remind them of the obligations imposed upon them by the great power which they confessedly wield. Especially do we desire to keep the judicial reputation of the state free from the appearance of dishonor, and to prevent the growth

of that distrust in the minds of our own people that would certainly follow the circulation of articles like the one under consideration, if permitted to go unrebuked.

The loss of public confidence in our integrity would be a calamity little less than the loss of official integrity itself. The pomp and circumstance which in England aid to clothe the courts and the law with dignity and power, are not in consonance with our republican form of government. In this country the power of the judiciary rests upon the faith of the people in its integrity and intelligence. Take away this faith, and the moral influence of the courts is gone, and popular respect for law impaired. Law with us is an obstruction. It is personified in the courts as its ministers, but its efficacy depends upon the moral convictions of the people. When confidence in the courts is gone, respect for the law itself will speedily disappear, and society will become the prey of fraud, violence and crime.

The one element in government and society which the American people desire above all things else, to keep free from the taint of suspicion, is the administration of justice in the courts. So long as this is kept pure, a community may undergo extreme misgovernment, and still prosper. But when these tribunals have become corrupt, and public confidence in them is destroyed, the last calamity has come upon a people, and the object of its social organization has failed. The protection of life, liberty and property is the final aim of all government. This is accomplished by an honest administration of just laws. The people, by their representatives, may be relied upon to pass such laws, but unless they are honestly administered, neither life, liberty nor property enjoys the security which it is the object of government and society to give. If the time shall unhappily ever come when the judiciary of this state has become hopelessly corrupt, and justice is bought and sold, the loss of its moral and material well being will as certainly follow as the night follows the day.

We are glad to say, that for more than half a century the judiciary of this state has not only enjoyed the confidence of the people, but also has received the support of the press. Never before, so far as the members of the court are aware, has the integrity of this tribunal been assailed by a public journal. The respectability of the paper in which the article in question has appeared, and the circumstances surrounding its publication,

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have given it a gravity which a casual article of like import would not possess. We have personally felt great reluctance to taking notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the state, if this article is to stand as an unpunished precedent, has compelled us to issue the rule, and now compels us to order an attachment.

It is the judgment of a majority of the court that an attachment issue against Charles L. Wilson and Andrew Shuman, returnable forthwith.

WALKER, J. I am also of the opinion that a writ of attachment should issue in this case.

McALLISTER, J., concurring. At the return of the rule to show cause, the defendants did not appear in person, but caused their separate returns under oath to be filed by attorneys, who declined to appear and argue the question raised by the returns. In this aspect of the case it is unnecessary to consider how far the matters set forth go in excuse of the publication; because, if the defendants relied upon an excuse only, they should have appeared in their own proper person. Not having done so, no mere excuse can be regarded as a cause for discharging the rule, but only as going to the question of punishment, in the event that the court finds the absence of a legal justification in the return. *The People v. Freer*, 1 Caines, 519.

The only legal justification sought to be established by the returns is the disavowal of a bad intent, and matter of law arising upon the face of the whole proceeding. In this behalf their position is that they have the legal right to do just what they have done, and this court has no power or authority, by this proceeding, to call their acts into question, inquire into their motives or the pernicious tendency of the publication. The editor of the paper states his position thus: "This respondent is advised and believes that the publication of said article had no tendency to impede, embarrass or obstruct the administration of justice in said court; that it was not so designed and had not that tendency, and this respondent does and will insist that he had, and still has, the right, as managing editor of said paper, to examine the

proceedings of any and every department of the government of this state, and that he is not responsible for the truth of such publication, nor for the motives with which they were or are made, by the summary process of attachment for contempt, save when such publications impede, embarrass or obstruct the administration of justice."

This position has been deliberately taken, and it is all there is of the case. If it has been well taken, the rule should be discharged; if ill, the attachment should issue. For the purpose of analyzing the alleged justification, we will treat it as in the nature of a plea in bar. Then what are its elements? By the return, actual participation in the act of publication by the editor, and constructive by the proprietor, are admitted. Then the only fact presented is the one of intent, by a disavowal of any bad intent; for the question, whether or not the publication had a tendency or was calculated to impede, embarrass or obstruct the administration of justice, is clearly a question of law, to be determined by the court upon inspection of the article. So, also, is that of the power of the court.

The return impliedly admits, that if the publication had the tendency to impede, embarrass or obstruct the administration of justice, the power of the court to punish the defendants for a contempt exists; but it claims virtually that the exercise of the power is precluded by the disavowal of any bad intent, and defendants' denial that the article had any such pernicious tendency. If the publication had the pernicious tendency which is claimed for it on behalf of the people, it is believed that no respectable authority can be found to the effect that a disavowal of a bad intent amounts to a justification. It would be contrary to the rule of law that every man must be presumed to intend the natural and necessary consequences of his own deliberate acts. In the case of *The People v. Freer*, above cited, which was a proceeding like this, the point was expressly adjudicated by the supreme court of New York, KENT, J., delivering the opinion of the court: "We cannot but perceive," said that great judge, "that the disavowal of any bad intent will not do away with the pernicious tendency or effect of publications reflecting on judicial proceedings which are before us."

I have said that the construction and tendency of the article in question were a matter of law for the court. Of the truth of this

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proposition there can be no doubt. But the court is bound to give it a fair and reasonable construction, according to the natural and common import of the language employed; and when so construed, the question whether its publication constituted a contempt which the court is authorized to punish by attachment, must be determined by the character of the publication and the circumstances under which it was made.

As to the circumstances, it will suffice to say, that at the time of the publication, the case of Rafferty, referred to in the article, was pending before us for decision. This fact was well known to the defendants, and especially to the editor, as appears by both his return and the article itself. It is of that cause and its pendency here that the article speaks; and the ordinary and natural meaning of the language used conveys, in the most direct and unequivocal manner, the charge of corruption on the part of this court, in respect to that very case; and was calculated and intended to portray the character and position of the court as being so degraded as to be under the control of the most unprincipled and despicable class of society. The first paragraph, relating to the delay of the court in deciding the case, evidently refers to its action at the time of allowing the supersedeas, in requiring Rafferty's counsel to submit the cause, in order that it might be passed upon at this term. Then it proceeds: The riff-raff who contributed fourteen hundred dollars to demonstrate that "hanging is played out" may now congratulate themselves on the success of their little game. Their money is operating splendidly. We have no hesitancy in prophesying clear through to the end just what will be done with Rafferty. He will be granted a new trial. He will be tried somewhere, within a year or two. He will be sentenced to imprisonment for life. Eventually he will be pardoned out, and this in spite of all our public meetings, resolutions, committees, virtuous indignation and what not. And why? Because the sum of fourteen hundred dollars is enough now-a-days to purchase immunity from the consequences of any crime. Then, that there might be no misunderstanding as to what is meant by this tissue of scandal, there come these significant words: "The courts are now completely in the control of corrupt and mercenary shysters—the jackals of the legal profession, who feast and fatten on human blood spilled by the hands of other men." This



expression would be understood, and was intended, to refer to this court, which was the only one previously alluded to; and what more degrading and scandalizing charge could be couched in language? It is well understood by the public that this court is the only one in the state which has the power to license and strike the names of attorneys from the rolls. If the court is under the complete control of the vile class designated, the degradation must be voluntary on the part of the court, yet it is here proclaimed to the public that a court which possesses the power to rid itself of the slysters and jackals of the legal profession is, nevertheless, completely under their control. After this charge, is followed what may well be called a threat. "All this must be remedied; there can be found a remedy, and it must be found."

The tendency of the article is to degrade and scandalize the court, to overawe its deliberations and extort a decision against the accused. That such was the intent and purpose, scarcely admits of a doubt. In this attempt to extort a decision of affirmation, rests the great criminality of the article, rather than the reflections upon the court. Publications scandalizing the court, and intended to unduly influence and overawe its deliberations in causes pending, are contempts which this court is authorized to punish by attachment, and it is essential to the dignity of character, the utility and independence of the court, that it should possess and exercise such authority. Here the corruption is imputed, and the effect predicted in such a manner as to prepare the public mind to believe the charge, if the decision turns out to be as predicted. Any well constituted judge would receive the threats of a mob gathered about the court house for the purpose of overawing his deliberations upon a particular case, with far greater coolness and equanimity, than such a threatened blot upon his character. Whatever may be the character of Rafferty, however humble and lowly in life, or however bad a man he may be, he is nevertheless clothed with the same constitutional rights which belong to the highest and best citizens in the state. He can be deprived of his life only by due process of law. He has the same right to invoke the safeguards devised for the protection of innocence, and to secure a fair and impartial trial, as though he were in fact innocent, and as any other citizen might do; because the law is, and in the nature of

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things must be, general in its application. The establishment of these rights by our beneficent constitution has cost too much suffering and blood, though in the distant past, to be readily relinquished by an intelligent people; and it seems an extraordinary spectacle to witness such an attack upon the character of this court, acting under the sanction of an oath of office, for exhibiting in its judicial action a proper respect for principles heretofore esteemed so sacred and so indispensable to the proper protection to life and liberty, and I can not refrain from remarking in this connection, that if this publication was made for the purpose of destroying those safeguards as a necessity for the suppression of the crime of murder in Chicago, as is avowed in the return, such a purpose ought to enhance instead of mitigating the criminality of the publication. It would take a long time, in my judgment, to inspire those criminally disposed, those born and reared in the haunts of vice, neglected by parents and society, without moral development, with a feeling of just respect for the sanctity of human life, by giving them examples, frequent examples, of the summary and reckless violation of that sanctity, by the public authorities, under forms of law divested of all the consecrated principles for the protection of innocence, by trials which could not be otherwise than grim mockeries of justice, controlled, swayed, and their results dictated by the passion and popular clamor of the hour. While I may truly say, that I have no feeling of resentment for the unwarranted attack upon the court of which I am a member, yet for this assault upon institutions which I have been educated to revere, I have feelings of deprecation and sorrow; and it is to be believed that a little careful observation and sober reflection will lead both the people and the press of Chicago to the conclusion that the fault lies not in the law nor yet in the courts. It seldom happens that a good and careful lawyer who has a good cause and wins it, has any trouble with errors in his record.

It is an unpleasant duty, but I feel constrained by the deepest convictions of conscience, by a lively regard for the credit of the state and her institutions, for the administration of justice, to concur in the opinion, that the rule should be made absolute, and that an attachment should issue.

THORNTON, J., also concurring. A return has been made to

the rule issued in this case, in which the respondents acknowledge the publication of the article, in the Chicago Evening Journal, and insist upon the right, through their paper, to examine the proceedings of every department of the government of the state, and that they are not responsible for such publications, nor answerable to the summary process of attachment for contempt, unless the publications impede, embarrass or obstruct the administration of justice. It is also urged that the publication had no such tendency.

The cause pending in the court, when the obnoxious publication was made, was *Rafferty v. The People*. Rafferty had been found guilty of murder, in the court below, and sentenced to be hanged. As was his right, according to the constitution and laws of the land, he demanded of this court a calm and dispassionate examination of the facts and questions presented in the record, and insisted that the law had been violated in his trial and conviction.

The life of a fellow man awaited our decision. The result to him was fearful; grave responsibility rested upon the court and the counsel, and solemn deliberation was required.

Under such circumstances, the publication was made, and while the court was in session. It refers to the court, and the case pending in it; intimates that the court had blandly assured the public that there should be a speedy examination; asserts that time had sped away, and no information had been given that anything definite had been done; that the prisoner's counsel was studying the policy of delay, with success, that the sum of fourteen hundred dollars, contributed to demonstrate that "hanging is played out," is operating splendidly; that the prisoner will be granted a new trial, and finally pardoned, in spite of the virtuous indignation of the public, "because the sum of fourteen hundred dollars is enough nowadays to enable a man to purchase immunity from the consequences of any crime," and then charges that "the courts are now completely in the control of corrupt and mercenary shysters, the jackals of the legal profession, who feast and fatten on human blood, spilled by the hands of other men." The slight allusion to the action of the legislature cannot relieve the gross attack upon the court and its officers. The case referred to in the publication has been reversed by a unanimous court, for manifest error in denying the accused a change of

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venue, and thus, it may be, depriving him of an impartial trial, vouchsafed to him by the constitution and the laws.

Was the publication a contempt of court? Or can there be none, except for disobedience of its orders or process, or disorderly or contemptuous behaviour in its presence?

The law, as it is written, must answer. In 2 Hawkins, 220, contempts are classified, as contempts in the face of the court, and contemptuous words or writings concerning the court. Again, they are termed ordinary or extraordinary. The latter consist of abusive and scandalous words respecting the court. Bouvier's Inst., vol. 4, 385. According to Blackstone, book 4, 285, they may be committed either in the face of the court, or "by speaking or writing contemptuously of the court or judges acting in their judicial capacity."

This court has defined them to be, direct, such as are offered in the presence of the court, while sitting judicially, or constructive, such, though not in its presence, as tend by their operation to obstruct and embarrass or prevent the due administration of justice. *Stuart v. The People*, 3 Scam., 395.

Bishop thus defines constructive contempts: "According to the general doctrine, any publication, whether by parties, or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or to reflect on the tribunal or its proceedings, or on the parties, the jurors or the counsel, may be visited as a contempt." Vol. 2, sec. 26.

In this state the constitution has established the judiciary, and made it a coördinate department of the state government. A necessary incident to its establishment is the power to punish for contempts.

This court held, in an early case, that the power to punish for contempts was an incident to all courts of justice, independent of statutory provisions. *Clark v. The People*, Breese, 340. Courts in other states have also announced the doctrine that the power is inherent in all courts of justice, necessary for self protection, and an essential auxiliary to the pure administration of the law. *United States v. New Belford Bridge*, 1 Woodbury & Minot, 407; *State v. Johnson*, Brevard, 155; *Yates v. Lansing*, 9 Johns., 416; *Cassart v. The State*, 4 Ark., 541; *Neil v. The State*, 4 Eng. (Ark.), 263; *United States v. Hudson*, 7

Cranch, 32. The statute likewise approves the exercise of the power, when it provides that the supreme court "shall have power to punish contempts offered by any person to it while sitting." This provision was in force July 1, 1829, and was the law when the decision in the case of *Stuart v. The People*, *supra*, was rendered. The court then declared that the statute "affirms a principle inherent in a court of justice, to defend itself when attacked, as the individual man has a right to do for his own preservation." The statute merely affirms a preëxistent power, and does not attempt to restrict its exercise to contempts in the presence of the court, but leaves them to be determined by the principles of the common law.

Without the power, courts could not fulfill their responsible duties for the good of the public. They would lose all self-respect and would not perform the duty they owe to the state, if they failed to struggle for their independence and defend their life.

No one doubts either the right or duty of a court to punish, as contempts, rude and contumelious behaviour, breaches of the peace, or any wilful disturbance in its presence.

Whence the necessity for the exercise of the power? It is that the law may be administered fairly and impartially, uninterrupted by any influence which might affect the safety of the parties, or the judge or officers of the court, that the court may have that regard and respect so essential to make the law itself respected, and that the streams of justice may be kept clear and pure.

If the court is scandalized and its integrity impeached, while a cause is pending before it, if the counsel are grossly libeled, and low and obscene terms are applied to them, which may have the effect to intimidate, the consequences must be the same as if direct contempts are offered. The administration of the law is embarrassed and impeded, the passions, often unconsciously, are roused, the rights of parties are endangered, and a calm and dispassionate discussion and investigation of causes is prevented.

The authority to punish for constructive contempts has been recognized by numerous courts, in England and America. I shall merely cite a few cases: *Respublica v. Passmore*, 3 Yeates, 44; *Oswold's Case*, 1 Dallas, 319; *People v. Freer*, 1 Caines, 515;

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*Tenney's Case*, 3 Foster (N. H.), 162; *Hollingsworth v. Duane*, Wall. C. C. U. S., 77; *United States v. Duane*, id., 102.

In *Tenney's Case*, the respondent was interested in a suit brought by his son against one of the defendants in a bill of equity, in which suit the son was unsuccessful, but he was not a party to and had no interest in the suit in equity, and while the bill was pending, he caused copies thereof to be printed and circulated extensively. The bill contained serious charges, and the respondent also said that he could stop the proceedings in equity if one thousand dollars were paid to him.

The conduct and language were out of the presence of the court, and it was held to be a contempt, and calculated to disturb the free course of justice. In conclusion, the court said: "The circulation of such charges, in the absence of proof, by a person unconnected with the questions to be tried, was dishonorable and vindictive in the highest degree, and an unwarrantable interference with the administration of justice."

In *Respublica v. Passmore*, *supra*, the defendant affixed a writing to a board in the exchange room in the city tavern, reflecting upon the parties to the suit, and the court held that the publication of such a paper prejudiced the public mind in a cause depending in court, and was a contempt.

In *Oswald's Case*, the publication in a newspaper, of wanton aspersions upon the character of the opposite party, was ruled to be a contempt, and Chief Justice McKean said, that without the power to punish for contempts no court could possibly exist—"nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible."

In the case of *The People v. Freer*, *supra*, a publication was made in a newspaper in regard to a cause under investigation, and was intended to prejudice the public mind against the court, and to intimidate it in its decision on the motion for a new trial. In the case of *People v. Croswell*, Kent, J., afterwards Chancellor, delivered the opinion of the court, and said that publications scandalizing the courts, or tending unduly to influence or overawe their deliberations, were contempts, which should be punished by attachment, and that it was essential to their dignity of character, their utility and independence that they should possess and exercise such authority.

In *United States v. Duane*, there was a publication in a news-

paper, pending the cause, reflecting upon the court and jury. The court held that it was a contempt, which had a tendency to deter counsel and intimidate the court, if they were susceptible of intimidation.

In the *State v. Morrill*, 16 Ark., 384, a publication was made in a newspaper, while the court was in session, which, in the language of the court seemed "to intimate, by implication, that the court was induced by bribery to make the decision referred to." It was regarded as a contempt, and an imputation upon the purity of the motives of the members of the court while acting officially in a particular case.

In determining the sufficiency of a plea to the jurisdiction of the court, Chief Justice English delivered an able opinion, and held that the right to punish for contempts was inherent in all courts of justice, a part of their life and a necessary incident to the exercise of judicial powers; that the section in the bill of rights, that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty," gave the right to any citizen to publish the proceedings and decisions of courts, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges, and the fidelity with which they perform their public trusts; but not by defamatory publications, to degrade the tribunal, destroy public confidence in it, and thus dispose the community to set at naught its judgments and decrees.

In the class of constructive contempts, this court has said "would necessarily be included all acts calculated to impede, embarrass or obstruct the court in the administration of justice. Such acts would be considered as done in the presence of the court." *Stuart v. The People*, *supra*.

The power is arbitrary, and should be exercised with prudence and moderation, and only in extreme cases. Indeed, all power is arbitrary; but this furnishes no reason why the silent power of a court should not be awakened to restrain wrong, and to check the attempt to destroy all respect for the law by calumination of its officers, who are the channels by which justice is conveyed to the people.

What is the nature and character of the publication, and what is its tendency and effect?

This court is charged impliedly, if not directly, with bribery.

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If such was not the intent, words are useless to convey an intent. This court, and the cause pending therein are mentioned, and a new trial predicted, not because the law demands it, but because immunity from crime can be purchased.

It is said that the money had been contributed. This court, at the time, had the control of the cause, and the power to condemn or acquit; and the charge is that it is so corrupt and debased that it will sell justice for a paltry sum, violate a solemn oath, and release a murderer in wilful disregard of the law.

The legislature is then threatened with bitter censure, unless it provides the most summary procedure in trials for murder, and immediate hanging upon conviction.

Wherefore this public outcry against the criminal law? The answer is given, because the courts are now completely in the control of corrupt members of the legal profession. This is defamatory of the court, as well as the profession, and particularly so of the counsel for the accused, an officer of this court of pure character and high standing.

Can it be possible that a court has power to punish at discretion, and in a summary mode, by fine and imprisonment, slight and trivial offenses in its presence, merely temporary in their effects, an undulation of the quiet surface, and cannot punish for calumny and defamation and impeachment of its integrity, which tend to embarrass its action, destroy its independence, rob it of its good name, intimidate it, if timidity is an element in its constitution, and eventually to degrade it?

Has it no power to protect counsel from the effect of publications, which are calculated to deter them from a bold and manly defense of suitors, for fear of the denunciation of the press?

No man who values character more than riches, and who has a consciousness of his own integrity, can aspire to be a member of a court; no lawyer, imbued with the spirit of an honorable profession, and who appreciates his own manhood, will practice in a court when infamous and damning charges are published against them while a cause is pending, and there is no power to stay the calumny and afford protection by summary punishment.

The exercise of the power to punish for such publications is not an abridgement of the freedom of the press. It can be no restraint upon the right to examine the proceedings of every branch of the government.



It is no restriction upon the privilege, secured to every citizen in the Bill of Rights, that "every person may freely speak, write and publish, on all subjects, being responsible for the abuse of that liberty."

These rights have well defined limits. They are correlative, and must respect other rights. They are not independent of all control. Even liberty is not unlicensed, but is regulated by law. The press can be free, in the broadest sense of the term, without blackening character or having a license to defame. Every man may freely speak and write without indulgence in slander or libel. Every branch of the government may be freely examined without false accusation, and unjust charges of crime against those who hold positions of trust. The truth is never to be feared, and may always be spoken and written; but the utterance of wilful and deliberate falsehood, disguise it as you may with good intention, is dangerous and cowardly, and deserves punishment and reprobation. It is an abuse of the rights guarantied by the constitution.

This court has not the power, nor the desire to arrogate it, to direct or control the press, in its legitimate sphere. Freedom of speech, and of the press, should be most jealously guarded. The utmost latitude should be allowed for fair, full and free review of the entire action of the courts. Just criticism may assail the opinions, expose their fallacy, and warn of their errors. The opinions of courts are not solemn edicts, to be blindly assented to, but are subject to calm and fearless stricture. The good taste and severity of the language—the weapons to be employed—whether reason or ridicule, must be determined by the writer. In popular governments, neither the public action nor official opinion of persons, in positions of trust, can be exempt from condemnation by the press, or in the assemblages of the people. But there must be toleration, for "error of opinion shall always be tolerated, when reason is left free to combat it." This character of animadversion should never be regarded as a contempt of court.

The freedom of the press, however, is fully protected, without licensing libel and ribaldry, and charges of corruption and bribery, against courts and their officers. Whatever the intent may be, though it may mitigate the offense, it cannot lessen the injury to character, or undo the mischief.

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The right of the respondents must be conceded to examine the proceedings of every department of the government, not in passion and with abuse, but with fair and manly argument. Good will then result, error may be exposed, and reason will resume its sway. Then the press will be a power and a blessing, and will exercise its constitutional right.

The publication under consideration is not criticism. Its tendency is to embarrass the court. It charges crime, when none exists. It is scandalous, abusive, passionate in tone and spirit. It impugns the integrity of this court, and classes the counsel of counsel amongst the most degraded of the profession. Its charges of crime are calculated to disturb the mind of the pure man, and unfit him for the discharge of arduous and responsible duties. Abuse can never convince. Passion must rouse passion.

The tendency must be to impair the usefulness of this court, deprive it of respect, obstruct it in the due administration of the law, and if silently submitted to, so debase it as to present it a spectacle beneath even contempt.

I concur in the issuance of the attachment.

SCOTT, J., dissenting: Having been opposed in the first instance to issuing the rule to show cause, I am of opinion, after more mature reflection, that the rule should not be made absolute.

Whatever may be the true construction of the article set out in the information, the respondents have both denied under oath, any purpose in its publication to obstruct or influence the administration of the law, or any intention to reflect upon the integrity of any member of the court, and this, it seems to me, is all that they ought to be required to do. No public good can possibly result from pressing the matter further. Independently of the disclaimer on the part of the respondents, I am unable to perceive how the article in question could in any manner affect, hinder or obstruct the administration of the law in this court. The newspaper in which the paragraph was printed was published in a city distant from the one where the court is now holding its sessions, and it was not thrust upon the attention of the court by the respondents or any one else. It is unlike the objectionable article in the case of *Stuart v. The People*, 3 Scam., 397, which

was published in the city where an important trial was pending before a jury, and which, with some propriety, could be said to be a constructive contempt, committed in the presence of the court. If it is anything more than simply an unjust criticism on the court in reference to a cause then pending, the most unfavorable view that can be taken is, that it is a constructive contempt, and as such, it could not directly or indirectly affect the administration of justice in an appellate court. I should be very unwilling to admit that it could have any such effect. It seems to me that the majority of the court have attached an undue importance to a mere newspaper paragraph.

From an early period in the history of our jurisprudence, the power has been conceded to all courts of general jurisdiction to punish, in a summary manner, contempts committed in their presence. The right rests on the necessity that was found to exist to enable courts to administer the law without interruption or improper interference, and to maintain their own dignity. So indispensable is this power that its just exercise, so far as it may be necessary for the due protection of the courts, has never been questioned.

The legislature has provided that the supreme and circuit courts may punish parties for contempts committed against them while sitting, and it is a very grave question whether it was not the intention, by implication at least, to limit the power of courts to punish for contempts to such as should be committed in their presence. I am not, however, unmindful that courts of the highest authority in this country and in England have assumed jurisdiction to punish, in a summary manner and on their own motion, what are termed constructive contempts — such an one as is sought to be set forth in the information filed.

The exercise of this extraordinary power by a court of final jurisdiction has ever been regarded as of questionable authority, and one liable to great abuse, and which might become dangerous to the liberty of the citizen. Its exercise by the courts in this country has been tolerated rather than conceded by constitutional provisions or legislative enactments. The objection proceeds on the ground that the court ought not to assume to be the judge of the offense against itself, and of the mode and measure of redress, where the law has provided, and where in the very nature of things there can be no mode of reviewing the ac-

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tion of the court in the premises. There has always existed jealousy against the exercise of arbitrary power by any tribunal supposed to be derived from common law sources, and not expressly granted by constitutions or laws enacted by legislative assemblies. It must be conceded that public journals have the right to criticise freely the acts of all public officers — executive, legislative and judicial. It is a constitutional privilege that even the legislature cannot abridge. Such criticism should always be just, and with a view to promote the public good. In case the conduct of any public officer is wilfully corrupt, no measure of condemnation can be too severe, but when the misconduct is simply an honest error of judgment, the condemnation ought to be mingled with charity.

The public have a profound interest in the good name and fame of their courts of justice, and especially of the courts of last resort. Everything that affects the well being of organized society, the rights of property and the liberty of the citizen, is submitted to their final decision. The confidence of the public in the judiciary should not be wantonly impaired. It is all important to the due and efficient administration of justice, that the courts of last resort should possess, in a full measure, the entire confidence of the people whose laws they administer. All good citizens will admit that he who wilfully and wantonly assails the courts by groundless accusations, and thereby weakens the public confidence in them, commits a great wrong, not alone against the courts, but against the people of the commonwealth. But who shall furnish the remedy? Shall the court that is assailed, or shall the legislative power of the state? In my judgment, there are many and politic reasons why the legislative power alone should provide the remedy, if any shall be found to be necessary. It is far better that the judges of the courts should endure unjust criticism, and even slanderous accusations, than to interpose, of their own motion, to redress the offense against themselves, where the offense complained of is not committed in their immediate presence. It is a matter of public history, that it has been the policy of the press in this country to uphold and maintain the authority and dignity of the courts. If a contrary policy should ever be inaugurated in this state, to such an extent as to seriously affect the reputation or impair the efficiency of the courts in the administration of the law, I have no

doubt that the legislature will afford an appropriate remedy. It was said by this court, in the case of *Stuart v. The People, supra*, that respect to the courts cannot be compelled; it is the voluntary tribute of the public to worth, virtue and intelligence, and while they are found on the judgment seat, so long and no longer will they retain the public confidence.

SHELDON, J., also dissenting: I do not concur in the action of the majority of the court, in this case. I am opposed to the exercise of the power of punishing for constructive contempts, where the alleged contempt consists merely in personal aspersions upon a court, contained in a newspaper article, especially in the case of an appellate court, where I am unwilling to admit that newspaper paragraphs affect, or are calculated to embarrass the administration of justice.

BREESE, J., also dissented from the action of the majority of the court, in entering the rule and awarding the attachment.

The writ of attachment awarded by the court was issued on the 6th day of November, 1872, in the following form:

"STATE OF ILLINOIS — *In the Supreme Court* — Northern Grand Division — September Term, A. D. 1872.

"*The People of the State of Illinois to the Sheriff of LaSalle County* — GREETING: Whereas, it has been made to appear that *Charles L. Wilson* and *Andrew Shuman* have printed and published an article which has been adjudged by the said court, now in session at Ottawa, in the aforesaid county and state, to have been printed and published in contempt of said court while so in session, as aforesaid:

"We, therefore, command you, that you attach the said *Charles L. Wilson* and *Andrew Shuman*, so as to have their bodies forthwith before our said supreme court, at Ottawa, in the county aforesaid, to answer the said court of the said contempt, by them lately committed against it, as it is said, and further, to do and receive what our said court shall, in that behalf, consider. Hereof fail not, and have you then and there this writ.

"Witness, Charles B. Lawrence, Chief Justice of said court, and the seal thereof, at Ottawa, this 6th day of November, in the year of our Lord one thousand eight hundred and seventy-two. W. M. TAYLOR, *Clerk of the Supreme Court.*"

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On the 8th day of November the respondents appeared in court, in answer to the writ of attachment, whereupon the chief justice pronounced the following sentence:

You, *Charles L. Wilson* and *Andrew Shuman*, are before this court under an attachment for contempt, in consequence of an article relating to a cause pending in this court, and published in a newspaper of which you, *Charles L. Wilson*, are the proprietor, and you, *Andrew Shuman*, are the chief editor.

In the opinion delivered by the majority of this court, when passing upon your return to the rule, to show cause why an attachment should not issue against you, we have said all that we desire to say in regard to the character of the publication, and the injury which such publications tend to cause to the administration of justice. It was then held that your answer showed no reason why an attachment should not issue. It now only remains to impose upon you a penalty for the offense. It is in the power of the court, in cases of this character, to punish by both fine and imprisonment. We have, however, no desire to inflict a severe penalty. Our object will be accomplished if we show to the press that it cannot be permitted to attempt to influence the decision of cases pending in the court. We are not unmindful of the fact that neither of you wrote the objectionable article, and that you, *Charles L. Wilson*, did not see it before its publication. We shall impose upon you only a moderate fine, as we cannot believe you are likely to commit similar offenses in the future.

You, *Charles L. Wilson*, are adjudged to pay a fine of \$100, and you, *Andrew Shuman*, are adjudged to pay a fine of \$200, to the treasurer of this state. You are also adjudged to pay the costs of this proceeding. The fine will be paid to the clerk of this court, who is directed to remit the same immediately to the state treasurer, and procure his receipt therefor, to be filed among the papers in this case.

The sheriff will hold the respondents in his custody until the fine and costs are paid to the clerk.

NOTE. — The action of the supreme court of Illinois, in this case, in punishing the proprietor of a newspaper for an article that was published in his paper without his knowledge or privity, must be based on the same principle that has been applied by the English courts in cases of criminal prosecutions for libel. In Walford's *Speeches of Lord Erskine* (vol. 2, p. 339), the doctrine is thus stated: "As the law stands at present (A. D. 1810), from a current of authorities, it is

undoubtedly not competent to any judge trying an indictment or information for a libel, to give any other direction to a jury than that a publication, though proved to have been sold by a servant, *without knowledge of the master*, involves the master in all the criminal consequences of the publication." This was the law, but before the present case, the reporter has not met with any American case in which this doctrine has been sanctioned or applied, and it is believed that the American courts will be slow to adopt it. The true doctrine would seem to be, that in every case where one is sought to be made criminally responsible for the act or default of another, as in the case of master and servant and husband and wife, that proof of the act and proof of the relation should never be more than *prima facie* evidence of guilt, leaving it open to the master or husband to show that the criminal act was not done by any consent, connivance, procurement, or made possible by any criminal negligence, on his part, and this when established should constitute a good defense. Further than this the law ought not to go. The ancient doctrine in criminal prosecutions for libel was only one instance of the wicked and pernicious consequences of "presumptions of law" as a means of proof in criminal cases. On the subject of the criminal responsibility of the master for the act of the servant in criminal prosecutions for libel, the eloquent language of Lord Erskine in *Cuthill's Case* is worthy of consideration: "In the case of a civil action, throughout the whole range of civil injuries the master is always *civiliter* answerable for the act of his servant or agent; and accident or neglect can therefore be no answer to a plaintiff complaining of a consequential wrong. If the driver of a public carriage maliciously overturns another upon the road, whilst the proprietor is asleep in his bed at a hundred miles distant, the party injuring must unquestionably pay the damages to a farthing; but though such malicious servant might also be indicted, and suffer an infamous judgment, *could the master also become the object of such a prosecution?* CERTAINLY NOT. In the same manner, partners in trade are *civilly* answerable for bills drawn by one another, or by their agents, drawing them by procuration, though fraudulently and in abuse of their trusts. But if the partner commits a fraud by forgery or fictitious indorsements, so as to subject himself to death, or other punishment by indictment, could the other partners be indicted? To answer such a question here, would be folly; because it not only answers itself in the *negative*, but exposes to scorn every argument which would confound indictments with civil actions. Why then is *printing and publishing* to be an exception to every other human act? Why is a man to be answerable *criminaliter* for the crime of his servant in this instance, more than in all other cases? Why is a man who happens to have published a libel under circumstances of mere accident, or if you will, from actual carelessness or negligence, but *without criminal purpose*, to be subjected to an infamous punishment, and harangued from a British bench, as if he were the malignant author of that which it was confessed before the court delivering the sentence, that he *never had seen or heard of?* As far indeed as damages go, the principle is intelligible and universal; but as it establishes a crime, and inflicts a punishment which affects character and imposes disgrace, it is shocking to humanity and insulting to common sense. The Court of King's Bench, since I have been at the bar (very long, I admit, before the noble lord presided in it, but under the administration of a truly great judge), pronounced the infamous judgment of the pillory on a most respectable proprietor of a newspaper, for a libel on the Russian ambassador, copied too, out of another paper, but which I myself showed to the court by the affidavit of his physician, appeared

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in the *first* as well as in the *second* paper, whilst the defendant was on his sick bed in the country, *delirious in a fever*. I believe that affidavit is still on the files of the court. I have thought of it often — I have dreamed of it, and started from my sleep — sunk back to sleep, and started from it again. The painful recollection of it I shall die with. How is this vindicated? From the *supposed* necessity of the case."

Following are additional cases on constructive contempts by publications reflecting on courts, and a fuller statement of some of the cases cited in the opinion:

"A person had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet, alleged by the defendants to be dead. The jury, during the defendants' case, had expressed themselves satisfied that the claimant was not the person; he swore he was, and he elected to be non-suited. The grand jury at the central criminal court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into the court of Queen's Bench; and it had been fixed, upon application of the attorney general, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister at law, had held meetings for the purpose of obtaining money for the defense at the coming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defense at the trial of the ejectment, and prejudice and partiality to Lord Chief Justice COCKBURN, who, they said, had proved himself unfit to preside at the trial of the indictments.

"They also asserted the innocence of the defendant, and the injustice of his treatment. On a summons against the members of parliament to show cause why they should not be punished for contempt, it was *held* that the trial of these indictments was a proceeding of the court then pending; that although the remarks at the meetings might be the subjects of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation, to deter the lord chief justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantedly interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court, and that it was the duty of the court to put a stop to them." *Reg. v. Onslow*, 12 Cox Crim. Cases.

In the matter of *B. F. Moore et al.*, 63 N. C., 397, it appeared that the respondents, who were attorneys of the supreme court, had signed and published a protest against the alleged political partisanship of the judges of the supreme court of North Carolina during the election campaign of 1868. The protest contained this language: "Never before have we seen the judges of the supreme court singly or *en masse* moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags. From the unerring lessons of the past, we are assured that a judge who openly and publicly displays his political party zeal renders himself unfit to hold the 'balance of justice,' and that whenever an occasion may offer to serve his fellow-partisans, he will yield to the temptation, and the 'wavering balance' will shake. It is a natural weakness in man, that he who warmly and publicly identifies himself with



a political party, will be tempted to uphold the party which upholds him, and all experiences teaches us that a partisan judge cannot be safely trusted to settle the great principles of a political constitution, while he reads and studies the book of its laws under the banners of a party." The court held that this publication was a contempt of court, which they had an inherent and constitutional right to punish summarily, by striking the respondents from the roll of attorneys, although it was admitted by the court that the statute of North Carolina, providing for the punishment of contempts of court, did not embrace this case.

In *State v. Morrill*, 16 Ark., 384, which was a proceeding to punish, as for a contempt, the publisher of a newspaper for an article reflecting on the court, the respondent pleaded to the jurisdiction of the court. The plea set up that the publication was not embraced within the statute regulating the punishment of contempts, and that the court could punish no act as a contempt except such as are enumerated in the statute. To this plea a demurrer was interposed and the court sustained the demurrer. The report of the case does not contain the article which was the subject of the proceeding. Its character and the circumstances under which it was published can only be gathered from the following language used by Chief Justice ENGLISH in delivering the opinion of the court:

"One Ellis was lodged in the jail of Pulaski county, on a charge of murder, failing to give the bail required by the committing magistrate. The office of the circuit judge of the district in which the offense was committed being at the time vacant, Ellis applied to the supreme court for a *habeas corpus*, alleging that the bail required by the magistrate was excessive; that he was unable to give it, and praying the court to inquire into the matter, and reduce the amount of bail, etc. The writ was accordingly issued, the cause heard on the 20th of February, upon the testimony produced, and the court being of the opinion that the offense was a bailable homicide, ordered the prisoner to be let to bail upon a recognizance, in the sum of \$5,000, with good and sufficient security for his appearance at the ensuing term of the Prairie circuit court, where the offense was cognizable. Failing to furnish the bail required, the prisoner was remanded to jail, with the privilege of being brought before the court again to enter into the recognizance, should he procure the requisite securities, which he failed to do.

"On the 24th of March following, and while the court was still in session, the defendant, it appears, from motives which it is of no consequence to conjecture, published the article in question, directly in reference to the decision of the court, upon the application of Ellis.

"The language of the article would seem to intimate, by implication, that the court was induced by *bribery* to make the decision referred to. It is not an attack upon the private character or conduct of the members of the court, as men, but seems to be an imputation against the purity of their motives while acting officially, as a court, in a specified case. Had the publication referred to them as individuals, or been confined to a legitimate discussion of the correctness of their decisions, in that or any other case, no notice would have been taken of it officially."

The court conceded that the Arkansas statute for the punishment of contempts did not extend to the publication in question, but nevertheless held that the court had a constitutional power to punish as for a contempt, for the publication of a libel, made during a term of the court in reference to a case then decided, imputing to the court, officially, *bribery* in making the decision—such power being inherent in courts of justice, springing into existence upon their creation, as a necessary incident to the exercise of the power conferred upon them.

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It was further held that the legislature had no power to abridge or abrogate this inherent, constitutional power of the court, and that the article in question was a contempt of court.

In *Respublica v. Oswald*, 1 Dall., 343, the respondent, who was defendant in a libel suit then pending in the court, published an address which was intended to prejudice the public mind upon the merits of the cause, and insinuated that from the prejudices of the judges against him, arising out of former trials, he did not stand a chance of a fair trial.

A rule was issued to show cause why an attachment should not issue to punish him as for a contempt. On a motion to discharge the rule, the court say: "Upon the whole, we consider the publication in question as having the tendency which has been ascribed to it, that of prejudicing the public (a part of whom must hereafter be summoned as jurors), with respect to the merits of a cause depending in this court, and of corrupting the administration of justice. We are, therefore, unanimously of opinion, on the *first* point, that it amounts to a contempt.

"It only remains then to consider whether the offense is punishable in the way that the present motion has proposed.

"It is certain that the proceeding by *attachment* is as old as the law itself, and no act of the legislature, or section of the constitution, has interposed to alter or suspend it. Besides the sections which have been already read from the constitution, there is another section which declares that "trials by jury shall be as *heretofore*;" and surely it cannot be contended that the offense with which the defendant is now charged was *heretofore* tried by that tribunal. If a man commits an outrage in the face of the court, what is there to be tried? What further evidence can be necessary to convict him of the offense than the actual view of the judges? A man has been compelled to enter into security for his good behavior, for giving the lie in the presence of the judges in *Westminster Hall*. On the present occasion, is not the proof from the inspection of the paper as full and satisfactory as any that can be offered? And whether that publication amounts to a contempt or not is a point of law, which after all, it is the province of the judges, and not the jury, to determine. Being a contempt, if it is not punished immediately, how shall the mischief be corrected? Leave it to the customary forms of a trial by jury, and the cause may be continued long in suspense, while the party perseveres in his misconduct. The injurious consequences might then be justly imputed to the court for refusing to exercise their legal powers in preventing them. For these reasons, we have no doubt of the competency of our jurisdiction; and we think that justice and propriety call upon us to proceed by *attachment*."

"The publication of a paper to prejudice the public mind, in a cause depending, is a contempt, if it manifestly refers to the cause, though it does not expressly appear upon the face of the writing." *Bayard v. Passmore*, 3 Yeates, 438.

On the other hand, in *Ex parte Hickey*, 12 Miss., 751, it was held that a newspaper article, published during the session of a court, pending the trial before that court of a prisoner indicted for murder, charging the judge presiding over the court with being an abettor of the murderer, is not a contempt of court, but a mere libel upon the functionary. The court also held that the statute providing for the punishment of contempt, was a limitation upon the power of the courts, and that nothing could be punished as a contempt except what came within the terms of the statute, and that a power of punishing a newspaper publication, as a constructive contempt, would be unconstitutional.

STATE *vs.* FOSTER.

(37 Iowa, 404.)

**EMBEZZLEMENT:** *What is sufficient employment—Newly discovered evidence.*

Under an indictment founded on the ordinary statute against embezzlement, evidence that the prosecutor gave the prisoner a watch which the prisoner, as agent for the prosecutor, was to trade for a wagon when he could find a suitable opportunity, and for which service the prosecutor was to pay the prisoner \$5.00, shows a sufficient employment to make the prisoner guilty of embezzlement in converting the watch to his own use.

On the trial of an indictment for embezzlement, the state gave evidence that the watch embezzled was worth \$95.00. The prisoner gave no evidence on this point. After the trial, it was discovered that the watch was not worth over \$10 or \$15. No negligence appearing on the part of the prisoner or his counsel, it was *held* that a motion for a new trial on this ground was improperly overruled.

BECK, C. J. 1. The second count of the indictment upon which the defendant was convicted charges that he, being "the servant and agent of one P. B. Furlong, and being over the age of sixteen years, did . . . by virtue of his said employment, have, receive, and take into his possession and under his control, one watch, of the value of \$95, the property . . . of P. B. Furlong, his employer, . . . and the said watch . . . without the consent of his said employer, did feloniously embezzle and fraudulently convert to his own use." The statute upon which this indictment was found, is as follows:

"If any officer, agent, clerk or servant of any incorporated company; or if any clerk, agent or servant of a copartnership; or of (if) any person over the age of sixteen years, embezzle and fraudulently convert to his own use, or take and secrete, with intent to convert to his own use, without the consent of his employer or master, any money or property of another, which has come to his possession, or is under his care by virtue of such employment, he is guilty of larceny, and shall be punished accordingly." Rev. Stat., § 4244. There was evidence tending to prove that, by an agreement between Furlong and the defendant, the latter undertook, in consideration of \$5, to be paid him by the former, to trade a watch, the property of the former, for a wagon. Defendant was to find some one owning a wagon, who

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would trade it for a watch, and make the exchange for Furlong. Under this agreement the watch was delivered to the defendant, who failed to make the trade, and converted the watch to his own use. The court instructed the jury upon this evidence as follows:

"7. If you find that Furlong and the accused made an agreement whereby the accused contracted to receive the watch and trade it for a two horse wagon for Furlong, for which he was to receive a compensation of \$5, this is sufficient to sustain the averments that the defendant was in the employment of said Furlong, and that he received the watch by virtue of this employment."

It is insisted that this instruction and the view of the case upon which it is based are erroneous, inasmuch as no such relation, or employment, is shown to have existed between the accused and Furlong, as is a necessary ingredient of the crime of embezzlement, under the statute.

It is insisted, in a very able argument by defendant's counsel, that the transaction between the parties, disclosed by the evidence and contemplated by the instructions of the court, constitutes an ordinary bailment, and could not, therefore, be the foundation of the crime of embezzlement.

It may be suggested, before proceeding to the discussion of the question presented, that the authorities cited, and others we have been able to consult, throw little light upon the subject, from the fact that they interpret, and apply to, statutes not entirely similar to the law of this state under which the indictment was found. Upon the construction of this enactment depends the solution of the question before us. Its language necessary to be interpreted, correcting the obvious typographical error found therein, is this: "If any person over the age of sixteen years embezzle and fraudulently convert to his own use, . . . without the consent of his employer or master any money or property of another which has come to his possession, or is under his care by virtue of his employment, he is guilty," etc.

The words indicating the relation that must exist between the accused and another, which is a necessary ingredient of the offense, are "employer," "master," "employment." We will, without notice of the word "master," consider the term "employer" and "employment." They are not of the technical

language of the law or of any science or pursuit, and must therefore be construed according to the context and the approved usage of the language. Rev. Stat., § 29, p. 2.

The words are defined as follows: *Employment*—"the act of employing or using. 2. Occupation; business. 3. Agency or service for another or for the public. *Employer*—one who employs; one who engages or keeps in service."

The verb "employ" is defined as follows, when used with a human being either as its subject or object: "To engage in one's service; to use as an agent or substitute in transacting business; to commission and intrust with the management of one's affairs." Webster.

It will be seen from the definition of these words that the statute contemplates the relation of agency, a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. It by no means appears that the idea of bailment or bailee is excluded from these definitions, but without following the thought or relying upon it, we will inquire whether the evidence establishes a relation of agency or service existing between the accused and Furlong, and whether such relation is contemplated by the instructions above quoted. We think it is in each. The watch was received under an agreement that the accused was to act for Furlong in making a contract of sale of the property, *i. e.*, exchanging the watch for a wagon. Can it be doubted that any proper contract of sale within the scope of the accused's authority would have bound Furlong? Certainly he would have been bound thereby; and one of the ingredients of the transaction creating it a binding contract upon him would have been the relation of agency existing between him and the accused. We conclude that the idea of agency is clearly expressed, both by the language of the indictment and instructions, and the relation is established by the evidence, or rather that there was evidence tending to establish it rendering the instruction relevant and proper, upon which the jury may well have found its existence.

We, therefore, find no error upon this point in the rulings of the court upon the instructions and the motion assailing the indictment, because the facts alleged do not constitute an offense under the statute. See upon this point 2 Whart. Am. Crim.

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Law, § 1936; *The People v. Dalton*, 15 Wend., 581; 3, Arch. Crim. Prac. and Pl., 450, 444 and notes.

A motion for a new trial because of newly discovered evidence was overruled. We think it should have been sustained.

Evidence as to the character of the watch and its value, showing it to be worth \$95, was given by the state. No evidence upon this point was introduced by the accused. His own affidavit and that of his counsel, we think, show the fact that they were not in possession at the time of the trial, of the names of any witnesses by whom the evidence on the part of the state, as to the value and character of the property, could have been contradicted. It is shown by the affidavits of these witnesses that the watch is of base metal and only of the value of \$10 or \$15. It does not appear that any fault or negligence can be properly attributed to defendant or his counsel in not introducing the evidence of these or of other witnesses upon the point at the trial; in fact the showing made is such that we must conclude that they were unable, from ignorance of the names of the witnesses, to do so.

The attorney general suggests that the evidence claimed to be newly discovered is but cumulative, on the ground that one of the witnesses of the state does not give as high a description of the character of the watch as the prosecuting witness. But nothing was said by him as to its value, and defendant's counsel, in the exercise of proper prudence, may well have feared to venture upon an attempt to establish a point in the defense by one of the state's witnesses.

The importance of the evidence cannot be questioned, for it is upon a fact which, if established, would reduce the offense from a felony to a misdemeanor.

For the error of the district court in overruling the motion for a new trial, on the ground of newly discovered evidence, the judgment is reversed.

*Judgment reversed.*

NOTE. — Whether or not money or property delivered by the owner to another for a particular purpose, and by that other fraudulently converted to his own use, can be said to be money or property received "by virtue of an employment," and the fraudulent conversion an embezzlement, may be considered still an open question in most American courts. The English doctrine is, that in such a case, there is no embezzlement, and Bishop seems to consider this the settled law. He says: "Another point is, that the money or other thing must not come into the mas-

ter's possession before it does into the servant's; for if it does, the taking of it, whether delivered to the servant by the master or not, is larceny; but it must come directly from a third person, and not from the master," *i. e.*, to constitute embezzlement. 2 Bish. Crim. Law, § 365, and cases there cited. No American case is cited which bears out this doctrine. On the contrary, as pointed out by Mr. Bishop in succeeding sections, the doctrine in New York and in Alabama is directly the reverse. Thus in *Loventhal's Case*, 32 Ala., 589, it was held that where a draft was delivered by an employer to a clerk which he was to present for acceptance and then return to his employer, and failed to return it, but fraudulently converted it to his own use, he was guilty of embezzlement. So in New York, in *People v. Dalton*, 15 Wend., 581, it was held that where a traveler at an inn handed a money letter to the bar-keeper to mail, and the bar-keeper, instead of mailing it, opened the letter and kept the money, that he was guilty of embezzlement. So in *People v. Nichols*, 3 Park. Crim. Rep., 579; where a quantity of pig iron was delivered to the defendant, a common carrier, to transport by canal from Albany to Buffalo, and on the way, at night, he secretly removed some from the boat, with a felonious intent, he was held to be guilty of embezzlement. In California the difficulties arising out of the English doctrine have been met by a statute which punishes the embezzlement of property *entrusted* to another as well as the embezzlement which comes to his possession by virtue of his employment.

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### THE QUEEN *vs.* NEGUS.

(2 Cr. Cas. Res., 34.)

EMBEZZLEMENT: "*Clerk or servant*," 24 and 25 Vict., ch. 96, sec. 68.

The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him: *Held*, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 and 25 Vict., ch. 96, sec. 68.

CASE stated by the assistant judge of Middlesex Sessions.

The prisoner was indicted for embezzling £17, as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders

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wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty, he applied for payment of the above sum, and having received it he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that the prisoner was not a clerk or servant within the statute, but the learned judge refused to stop the case, and directed the jury to find him guilty.

The question was whether, upon the facts stated, the prisoner was a clerk or servant, and as such rightly convicted of embezzlement. See 24 and 25 Vict., ch. 96, sec. 68, *ante*, p. 29.

No counsel appeared for the prisoner.

*F. F. Lewis*, for the prosecution: *Reg. v. Bowers*, 2 Law Rep., 1 C. C., 41, somewhat resembles the present case, and is an authority in favor of the prisoner; but there the commission agent carried on a retail trade for himself at a shop, and so could not be deemed a clerk or servant of the merchant who supplied coal for him to sell.

[BOVILL, C. J. And here the prisoner might apply for orders wherever he thought most convenient.]

So might the traveler in *Reg. v. Baily*, 12 Cox Cr. C., 56; he was nevertheless held to be clerk or servant of his employers.

[BLACKBURN, J. For he was under their control, having to devote his whole time to the service.]

The stipulation that the prisoner was not to employ himself for any other persons than the prosecutors shows that they had control over him.

[BOVILL, C. J. Not at all. He might go away to amuse himself wherever he liked.]

*Reg. v. Tite*, Leigh & Cave Cr. C.; *Reg. v. Turner*, 11 Cox Cr. C., 551, were also cited.

BOVILL, C. J. The only question submitted to us is whether, on the facts stated, the prisoner was a "clerk or servant," and, as such, rightly convicted of embezzlement. The learned assistant judge of the court directed the jury to find the prisoner guilty, subject to this point being raised.

Generally speaking, I should say that the question whether a person is a clerk or servant depends on so many considerations that it is one to be left to the jury, as it is extremely difficult for



the court to come to a satisfactory conclusion upon such a matter. Much depends on the nature of the occupation in which the individual is engaged, and the kind of employment. But we have to see if there was enough evidence to show that the prisoner here was a clerk or servant. I think that that fact is not sufficiently made out. What is a test as to the relationship of master and servant? A test used in many cases is, to ascertain whether the prisoner was bound to obey the orders of his employer, so as to be under his employer's control, and on the case stated, there does not seem sufficient to show that he was subject to his employer's orders, and bound to devote his time as they should direct. Although under this engagement with them, it appears he was still at liberty to take orders, or to abstain from doing so, and the masters had no power to control them in that respect. Where there is a salary, that raises a presumption that the person receiving it is bound to devote his time to the service, but when money is paid by commission, a difficulty arises, although the relationship may still exist where commission is paid, as in ordinary cases of a traveler, and in *Reg. v. Tite*, Leigh & Cave Cr. C., 29; 30 L. J. (M. C.), 142, and the other case cited. But in either case there may be no such control, and then the relationship does not exist. All the authorities referred to seem to show that it is not necessary that there should be a payment by salary—for commission will do—nor that the whole time should be employed, nor that the employment should be permanent—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as servant. The facts before us do not make out what the prosecution was bound to prove, viz., that the prisoner was clerk or servant.

BRAMWELL, B. This conviction ought to be quashed, unless we can see that the prisoner on the facts stated must have been clerk or servant, within the meaning of the act of Parliament. I am of opinion that on the facts we cannot do so. Looking to principle, we find that the statute was intended to apply, not to cases where a man is a mere agent, but where the relationship of master and servant, in the popular sense of the term, may be said to exist. ERLE, C. J., in *Reg. v. Bowers*, Law Rep. 1 C. C. R., 41, at p. 45, says the cases decide "that a person who is employed to get orders and receive money, but who is at liberty to

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get those orders and receive that money when and where he thinks proper, is not a clerk or servant within the meaning of the statute." I think that is perfectly good law, consistent with all the authorities, and, applied here, it shows that the prisoner was not a clerk or servant within the definition there given.

BLACKBURN, J. I am of the same opinion. The test is very much this, viz., whether the person charged is under the control and bound to obey the orders of his master. He may be so without being bound to devote his whole time to this service; but if bound to devote his whole time to it, that would be very strong evidence of his being under control. This case differs in nothing from the ordinary one of a commission agency, except in the sole statement that the prisoner was not to work for others. But I do not think that circumstance, by itself alone, enables us to say that he was a servant of the prosecutors.

ARCHIBALD, J., concurred.

HONYMAN, J. I agree. The question was not left to the jury to decide, and I cannot satisfy myself that the relationship of master and servant existed between the prosecutors and the prisoner. It does not appear that the prisoner was bound to obey every single lawful order. Possibly the masters might tell him to go somewhere, and he might justly refuse.

*Conviction quashed.*

Attorneys for the prosecution, *Allen & Son.*

# QUEEN vs. FOULKES.

(2 Cr. Cas., Res. 150.)

## EMBEZZLEMENT: *Clerk or servant.*

The prisoner's father was clerk to a local board, and held other appointments.

The prisoner lived with his father, and assisted him in his office, and in the business of the board. In his father's absence, the prisoner acted for him at the meetings of the board, and when present, he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use: *Held*, that there was evidence that the prisoner was a clerk or servant to his father, or employed as clerk or servant, and was guilty of embezzlement from him.

CASE stated by QUAIN, J.

The prisoner was tried at the last assizes for Shropshire, for embezzlement. The indictment on which the prisoner was tried contained four counts. On the first count he was charged that on the 22d day of September, 1871, he was employed as clerk to the local board of Whitechurch and Dodington, and received 600*l.* on account of said local board, and did steal 100*l.*, parcel of the said 600*l.*, the moneys of the said local board, his employers. On the second count, that on the 14th of February, 1872, he embezzled the sum of 100*l.*, the moneys of the said local board, his employers. On the third count, that on the 22d day of September, 1871, he embezzled the sum of 100*l.*, parcel of a sum of 600*l.*, the moneys of Charles Foulkes, his master. On the fourth count, that on the 14th day of February, 1872, he embezzled the sum of 100*l.*, the moneys of Charles Foulkes, his master. Charles Foulkes, the father of the prisoner, was appointed clerk to the local board of Whitechurch and Dodington, at a salary of 40*l.* a year, and continued to hold such appointment till his death. Charles Foulkes held various other appointments. The business of the board was transacted at his office, the board paying him a rent for the use of it. The prisoner lived with his father, and assisted him in his office, and in conducting the business of the local board. In the absence of his father, prisoner acted for him at the meetings of the local board, and assisted his father when present. Prisoner was not appointed or paid by the local board. There was no evidence that prisoner was paid any salary by his father. The only evidence was that he in fact assisted his father as clerk, or servant, or assistant in his office as above described. In the year 1871, and while Charles Foulkes was clerk to the local board as above mentioned, the board had occasion to raise a loan for the purpose of building a market. The money was raised on mortgages of the local rates. The prisoner managed the business of the loan for his father. He filled in the usual form of mortgage, and either he or his father obtained the proper signatures of the members of the local board. The course of business was, that prisoner received, at his father's office, the money from the mortgagees, in exchange for the mortgages, and paid it into the Whitechurch and Ellesmere Bank (who were the treasurers of the board), to an account called the "market account." In the course of his employment, he embezzled and appropriated to

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his own use the sum of money mentioned in the indictment. It was objected by the counsel for the prisoner, that he could not be convicted of the first two counts of the indictment, as he was not a clerk or servant of the board, nor employed by the board in that or any other capacity; and that he could not be convicted on the third or fourth count, as there was no evidence that he was the clerk or servant of his father, or was employed by him in that capacity, beyond the fact that he assisted his father, and that the moneys embezzled were not the moneys of Charles Foulkes, but of the local board. The prisoner was convicted and sentenced, but the learned judge respited the execution of the sentence till after the decision of the court in the case. The question for the court was, whether, upon the above facts, the prisoner could be properly convicted on any of the counts of the indictment. The following cases were cited before the learned judge: *Reg. v. Negus*, Law Rep. 2 C. C., 34; *Reg. v. Beaumont*, Dears. Cr. C., 270; 23 L. J. (M. C.), 54; *Reg. v. Tyree*, Law Rep. 1 C. C., 177, and the 11 and 12 Vict., ch. 63, sec. 138, was referred to as authorizing the board (the district being a non-corporation district) to allege that the property was the property of their clerk.

*Rose*, for the prisoner. The prisoner could not properly be convicted of embezzlement. To constitute embezzlement by a person "being a clerk, or servant, or being employed for the purpose or in the capacity of a clerk or servant,"<sup>1</sup> there must be a contract of service of some kind, either expressed or implied. In the present case there was none, for the prisoner was in no sense in the employment of the local board, and the services he rendered to his father were mere voluntary services, not rendered in pursuance of any contract. He cited *Rex v. Burton*, 1 Moo. Cr. C., 237; *Rex v. Hettleton*, 1 Moo. Cr. C., 259; *Reg. v. Bowers*, Law Rep., 1 C. C., 41; *Reg. v. Tyree*, Law Rep., 1 C. C., 177; *Reg. v. Turner*, 11 Cox Cr. C., 551; *Reg. v. Collum*, Law Rep., 2, C. C., 28; *Reg. v. Negus*, Law Rep., 2 C. C., 34.

No counsel appeared for the prosecution.

<sup>1</sup> By 24 and 25 Vict., ch. 96, sec. 68: "Whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer \* \* \* shall be deemed to have feloniously stolen the same from his master or employer." \* \* \*

COCKBURN, C. J. I think there was evidence on which the jury might well find that the prisoner either was a clerk or servant. The father held various offices, and the prisoner, his son, in consequence of his father's illness, or for other reasons, did the duties which the father would otherwise have had to do himself, or to employ a clerk to do. It is true there was no contract binding him to go on doing those duties. But the relation of master and servant may well be terminable at will, and while the prisoner did act, he was a clerk or servant.

The second question is, whether there was an embezzlement. I think there was. The money was to be received by the father, though received for the local board. He was the proper custodian of the money, and the son received it for him. There was, therefore, evidence upon both points.

BRAMWELL, B. I am of the same opinion. If the prisoner had not been the son of the man for whom he acted, and had not lived with him, it is abundantly evident that he would have been a clerk or servant, and would have been entitled to payment upon a *quantum meruit*. Then what difference can his being a son make? It may affect the nature of his remuneration, but nothing else.

With regard to the money, the father might have had to account for it, but he was entitled to receive it from the son, therefore there was an embezzlement.

MELLOR, J. The only difficulty which I can collect that the learned judge felt was, that there was no evidence of an actual contract of employment. But there is clear evidence that in what the prisoner did, he was a clerk or servant.

BRETT, J. The prisoner undertook to do things for his father which a clerk does for his master, and to do them in a way a clerk does them. Now, assuming that there was no contract to go on doing those things, still as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk.

POLLOCK, B. If it had been necessary to say absolutely that the prisoner was a clerk or servant, I should have hesitated.

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But I think the words "employed as clerk or servant" are wider, and that there is evidence to bring the case within them.

*Conviction affirmed.*

Attorney for prisoner, *G. F. Cook*; for Chandler, *Shrewsbury*.

### THE QUEEN vs. CHRISTIAN.

(2 Cr. Cas., Res. 94.)

AGENT: *Misappropriation of money — Direction in writing — 24 and 25 Vict., ch. 96, sec. 75.*

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in charges for round sums. On one occasion he wrote to her, "I inclose a contract note for 300*l.* J. bonds, at 112, 336*l.*," and the contract note ran, "Sold to Mrs. S. (the prosecutrix), 300*l.* J., at 112, 336*l.*," and was signed by the prisoner. The prosecutrix wrote in reply: "I have just received your note and contract note for three J. shares, and inclose a cheque for 336*l.* in payment." The prisoner never paid for the bonds, but in violation of good faith, appropriated to his own use the proceeds of the cheque: *Held*, that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 and 25 Vict., ch. 96, sec. 75; and that the prisoner was rightly convicted of a misdemeanor under that section.

#### CASE stated by HONYMAN, J.

The prisoner was tried at the October session of the central criminal court, 1873, for converting to his own use or benefit the proceeds of a cheque for 336*l.*, with which he had been intrusted as the agent of Mary Ann Spooner, contrary to the statute, 24 and 25 Vict., ch. 96, sec. 75.<sup>1</sup>

<sup>1</sup>By 24 and 25 Vict., ch. 96, sec. 75: "Whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds, or any part of the proceeds, of such security for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively, . . . shall be guilty of a misdemeanor, . . ."

The prisoner was a stock and share dealer, carrying on business at 11 Royal Exchange. In the year 1872 a Mrs. Spooner, a widow, was introduced to the prisoner, and the prisoner offered to make any investments for her that she might wish, and told her that out of respect to her late husband, he would not make her any charge for so doing. Between this time and the 1st of November, 1872, the prisoner purchased for her at different times, a variety of securities, amounting in the whole to 1,326*l.*, 17*s.*, 6*d.*, for doing which he made no charge; and, on the other hand, Mrs. Spooner from time to time made payments to the prisoner, amounting in the whole to 1,886*l.*, 2*s.*, 6*d.*, such payments not being made specifically against any particular item, but in cheques in round sums.

On the 12th of November, 1872, the prisoner made the following suggestion to Mrs. Spooner:

"11 ROYAL EXCHANGE, LONDON, E. C.,  
"November 12, 1872.

"AMENDED SCHEME OF INVESTMENT.

" Argentine, 6 per cent., .....	Price (say)	97 (2 bonds).....	194 <i>l.</i>
" Austrian Silver Rentas, 5 per cent., "	67 "	.....	134 <i>l.</i>
" Chilian, 6 per cent. ....	103 "	.....	206 <i>l.</i>
" Chilian, 7 per cent. ....	108 (1 bond).....	.....	108 <i>l.</i>
" Japanese, 9 per cent. ....	111 (2 bonds).....	.....	222 <i>l.</i>
" United States, 5-20, 6 per cent. ....	93 (5 bonds).....	.....	465 <i>l.</i>
			<hr/> 1,326 <i>l.</i>

"Producing 89*l.* per annum.

"DEAR MADAM: The above is an amended scheme of investment, which I trust you will find in accordance with your wishes.

"No doubt it will be better to take advantage of present lower quotations, wherever prices have been affected by late events, and I will proceed to act immediately on receiving your instructions to that effect.

"I remain, dear madam, yours truly,

"Mrs. Spooner, etc., etc.

Y. CHRISTIAN."

Mrs. Spooner assented to this, and on the 14th of November, 1872, the prisoner purchased on her account, but in his own name, from one Wrenn, a jobber on the Stock Exchange, the three sets of securities mentioned in the contract note of the 14th of November, 1872, hereinafter set out, and sent to Mrs. Spooner the following letter and contract note:

"DEAR  
note for

"200*l.*

"200*l.*

"\$2,50

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Apr. 10.

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"11 ROYAL EXCHANGE, LONDON, E. C.,

"November 14, 1872.

"DEAR MADAM: I have much pleasure in inclosing contract note for

"200l. Argentine... .. 68 @ 96  
 "200l. Austrian Sil..... @ 65½  
 "\$2,500, 5-20, 1867..... @ 93½

which I have every reason to believe will pay you very well, taking into consideration their stability. I hope to get the Japanese to-morrow. Railways — Great Northern, Great Western and Caledonia — are all expected to give good dividends, and I think you will do well to procure a few. The markets are on the rise in consequence of the bank rate not having been altered.

"I beg to remain, dear madam, yours most obediently,

"(Signed.)

Y. CHRISTIAN.

"Mrs. SPOONER."

"LONDON, November 14, 1872.

"Sold to Mrs. SPOONER. L. s. d.  
 "200l. Argentine, 1868, @ 96, net..... 192 0 0  
 "200l. Austrian Silver @ 65½..... 131 0 0  
 "\$2,500, 5-20, 1867 @ 93½..... 525 18 9

[REV.]

"Y. CHRISTIAN,  
 [STP.]

"Stock and share dealer, 11 Royal Exchange, E. C.

"Bankers — Bank of England."

The prices mentioned in this note were the same as those agreed between the prisoner and the vendor of the bonds, etc. The prisoner did not disclose his principal, but said he was buying for a widow lady.

On the 15th of November, 1872, Mrs. Spooner sent to the prisoner the following statement of account between herself and the prisoner:

STATEMENT OF ACCOUNT.

	L.		L.	s.	d.	L.	s.	d.
Feb. 3. 200 New South Wales Govt. Stk., @ 104½,	209	5	0	....	..	..	..	..
Feb. 3. 200 Victoria 6 per cent. Govt. Stk., @ 114½	228	15	0	....	..	..	..	..
Apr. 10. 25 Western Gas (A. B. or C.), @ 17¼...	443	15	0	....	..	..	..	..
Apr. 10. 7 Imperial Gas (12½l. issue), 10l. pd. @ 4 p. m.....	98	0	2	....	..	..	..	..
Apr. 10. 8 Reuters Tel., @ 11 ¼, Stamp Fee...	90	10	0	....	..	..	..	..
Apr. 17. 13 Imperial Gas (12½l. issue), 10l. pd. @ 4 p. m.....	182	0	0	....	..	..	..	..
Stamp and Fee .....	1	2	6	....	..	..	..	..



	<i>L.</i>	<i>L.</i>	<i>s.</i>	<i>d.</i>	<i>L.</i>	<i>s.</i>	<i>d.</i>
Apr. 17.	Stamp and Fee, 7l. Imp. Gas, Apr. 10, ...	12	6	...	...	...	...
Apr. 10.	25 Western Gas, Apr. 10.....	2	7	6	...	...	...
Apr. 22.	5 Imperial Gas, @ 14.....	70	0	0	...	...	...
	Stamp and Fee.....	0	10	0	...	...	...
Nov. 14.	200 Argentine, 1868, @ 96.....	192	0	0	...	...	...
	200 Austrian Silver, @ 65½.....	131	0	0	...	...	...
	\$2,500 5-20, 1867, @ 93½.....	525	18	9	...	...	...
		<u>2,175</u>	<u>16</u>	<u>3</u>			
Feb. 3.	By cheque.....	...	...	...	500	0	0
Apr. 10.	By ".....	...	...	...	600	0	0
Apr. 11.	By ".....	...	...	...	100	0	0
Apr. 18.	By ".....	...	...	...	186	0	0
Apr. 23.	By ".....	...	...	...	500	0	0
					<u>1,886</u>	<u>2</u>	<u>6</u>
	Balance .....	...	...	...	282	13	9
					<u>2,175</u>	<u>16</u>	<u>3</u>

Accompanied by the following letter:

"2 PEMBERTON TERRACE, ST. JOHN'S PARK,  
"Nov. 15th, 1872.

"MY DEAR SIR:—I inclose a statement of account, with a cheque for the balance, which I hope you will find correct. When I know the amount of the Japanese, I will immediately forward you a cheque for the same. With my best thanks for all your kindness,

I am, yours faithfully,

"Y. CHRISTIAN, Esq. (Signed) M. A. SPOONER."

And also by cheque for 289*l.* 13*s.* 9*d.*, payable to the prisoner or order, and the prisoner, on the 16th of November, acknowledged the receipt of the cheque and account, and obtained payment of the former.

On the 27th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner:

Y. CHRISTIAN,  
Stock and Share Dealer.  
Bankers—  
Bank of England.

"11 ROYAL EXCHANGE,  
"LONDON, E. C.,  
"November 27th, 1872.

"DEAR MADAM:—I inclose a contract note for 300*l.*, Japanese bonds at 112—336*l.*

"This 300*l.* was offered to me in one lot, and I thought myself fortunate in securing them for you, and had no doubt of your ratifying what I have done. These Japanese securities are really

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a first-rate investment, and will pay 8 per cent. I have got them at the lowest price of the day, and indeed, my apparent dilatoriness in the matter has been caused solely by my anxiety to get them cheaper, if I could. Yours truly,

"Mrs. SPOONER, etc. (Signed) Y. CHRISTIAN."

And inclosed is the following contract note:

"LONDON, *Nov. 27th, 1872.*

"Sold to Mrs. M. A. Spooner 300*l.*, Japanese @ 112 — 336*l.* 0*s.* 0*d.*

"Stock and Share Dealer, [Revenue]

"11 Royal Exchange, E. C. Y. CHRISTIAN.

"Bankers — Bank of England. [Stamp.]"

The prisoner had on the same day bought in his own name, from Mr. Wrenn, three Japanese bonds at 112.

It was not true that the 300*l.* was offered to the prisoner in one lot; but the prisoner asked Mr. Wrenn for these bonds.

On the same day Mrs. Spooner sent to the prisoner the following letter:

"2 PEMBERTON TERRACE, ST. JOHN'S PARK,

"*Nov. 27th, 1872.*

"MY DEAR SIR:— I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l.* in payment.

"I am much obliged to you, and perfectly satisfied that you have purchased the three shares for me.

"My son Frank will be bearer of this, and I shall feel obliged if you will kindly give him any information you can about the 'Nicholas Railway,' and the 'Share Investment Trust.'

"Again thanking you, in haste,

"Believe me, yours faithfully,

(Signed) "M. A. SPOONER."

And also a cheque for 336*l.*, payable to the prisoner or order, and the prisoner received and indorsed the cheque, and received the proceeds thereof.

On the 29th of November, 1872, the prisoner wrote the following letter to Mrs. Sponer:

Y. CHRISTIAN,  
Stock and Share Dealer.

Bankers —  
Bank of England.

"11 ROYAL EXCHANGE,

"LONDON, E. C.,

"*November 29th, 1872.*

"DEAR MADAM:— I have to acknowledge the receipt of your

cheque for 336*l.*, value for three Japanese bonds, which I shall have the pleasure to forward you immediately on their being delivered. I now inclose two 100*l.* Argentine bonds, of the Six per cent. Loan of 1868, Nos. B, 12,309 and 1572; and two bonds for 1000 florins each, of the Austrian Currency Loan, Nos. 495,402 and 495,403.

"With reference to the latter portion of your note, I will at once say, I do not recommend either the Nicholas Railway or the Share Investment Trust. But turning the matter over, I consider, for safety and profit, a sum laid out on Great Western or North London Railway Shares will do good. For that purpose, however, we must watch the market, and take advantage of a day or week when prices have declined. But, of course, I shall do nothing till I have your sanction for proceeding.

"Yours truly,

"Mrs. SPOONER, etc. (Signed) Y. CHRISTIAN."

Mrs. Spooner never received either the 2500 United States bonds, or the Japanese, though she repeatedly applied to the prisoner for them; and the prisoner, on one occasion, told her that the broker or jobber was in his debt, and that the broker or jobber knew that when he delivered the bonds the prisoner would deduct from the price the amount of such debt. On the 8th of August, 1873, the prisoner offered Mrs. Spooner a composition, and informed her he was filing a petition for liquidation. Ultimately, the United States bonds and the Japanese bonds, having been carried over from time to time, by the order of the prisoner, without the knowledge of Mrs. Spooner, were sold by the orders of the prisoner.

The prisoner never paid the person from whom he bought the United States and Japanese bonds, for the same, and the cheques for 289*l.* 13*s.* 9*d.*, and 336*l.*, were paid into the prisoner's account, and the proceeds of such cheques applied by the prisoner to his own purposes.

At the close of the case for the prosecution, it was contended on behalf of the prisoner, that Mrs. Spooner's letter of the 27th of November, 1872, did not constitute a sufficient direction in writing to apply, pay or deliver the cheque or its proceeds for any purpose or to any person specified in such direction, within the meaning of the statute.

The learned judge left the case to the jury, but reserved the

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The jury found the prisoner guilty. The question for the opinion of the court of criminal appeal was, whether Mrs. Spooner's letter of the 27th of November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese bonds was, under all the circumstances of the case, a sufficient direction in writing within the statute.

*Metcalfe, Q. C.* (*Collins* with him), for the prisoner. The section under which the prisoner was indicted was passed originally to meet the case of *Rex v. Walsh* (R. & R.), Cr. C., 215, and it applies only to a case in which there is a direction to apply the security itself, or the specific moneys received as its proceeds, in a particular way. But here the course of dealing between the parties shows that the prisoner was at liberty to pay any cheque received from the prosecutrix into his own bankers. The cheque was in fact sent to him to indemnify him for any payment he had made, or had rendered himself liable to make, for the prosecutrix. This is the natural meaning of the words "in payment." He also cited *Reg. v. Golde*, 2 Moo. & Rob., 425.

*Meade*, for the prosecution, was not called upon.

KELLY, C. B. By the terms of the statute, "whosoever having been intrusted as a banker, merchant, broker, attorney, or other agent, with any money, or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, convert to his own use such money, security or proceeds, or any part thereof," is guilty of a misdemeanor. And the only question in the present case is, whether the instructions contained in the prosecutrix's letter of the 27th of November were a "direction" within the meaning of the act, and if so, what the meaning of the direction was. In my opinion, that letter, when fairly construed, does amount to a direction, and such a direction that the prisoner might rightly be said to have converted the proceeds of the cheque to his own use, contrary to its terms.

The prisoner had been in the habit of purchasing securities for

the prosecutrix, and receiving cheques from her in respect of them. It does not very clearly appear whether in all instances he purchased in his own name, nor is it very material. Then, in his letter to her of the 27th of November, he says: "I inclose a contract note for 300*l.* Japanese bonds, at 112, 336*l.*" And the contract note inclosed was in this form: "Sold to Mrs. M. A. Spooner 300*l.* Japanese at 112, 336*l.*," and was signed by the prisoner. This contract note and the letter in which it was inclosed are both ambiguous. They might mean that the prisoner had bought the bonds and had got them, so that there was nothing to do but to hand them over to the prosecutrix on payment by her of the price, and in this case, her letter in reply, "I have just received your note and contract note for three Japan shares, and inclose a cheque for 336*l.* in payment. I am perfectly satisfied that you have purchased the three shares for me," might well mean, "Whereas, you have bought and paid for the bonds, you will receive this cheque in payment to yourself." But the prisoner's letter might also mean that he had bought the bonds in his own name, but that they were not yet handed over because not paid for; so that it was necessary to get money to pay for them. And if this had been explicitly stated, then the prosecutrix's letter in reply would have meant, "I send you a cheque which you will either hand over to the seller of the bonds, or obtain payment of it, and hand the proceeds or your own cheque in lieu of them to the seller." And upon this view the offense charged would clearly have been committed.

If, then, either construction of the letter is fairly possible, must we not read it in the alternative, as saying, "You do not state whether you have paid for the bonds; if you have done so, keep the cheque, if not, then apply the money in payment to the seller, so that you may get the bonds, and hand them over to me?" And so reading the letter, and applying it to the state of facts that really existed and were known to the prisoner, it became a direction to apply the cheque or its proceeds in payment for the bonds, and the prisoner was, therefore, rightly convicted.

BLACKBURN, J. I am of the same opinion. Before turning to the words of the statute, look at the facts. The prisoner, being an agent within the meaning of the statute (for as to that no question is reserved), consents to act on the terms contained in

his first letter. The instruction is immaterial. It is established between the parties that the rate no doubt was personally liable for paying for the bonds. He was repaid in full beforehand, so that nothing, he says, was due to the prosecutrix here. He is writing the cheque, as there is no need for these bonds, and it is convenient to the prisoner that he should have the notes received. I think he has a bank *bona fide* given to the prosecutrix to prevent the proceeds from going to the prosecutrix. The proceeds to the prisoner on the part of the prosecutrix.

Turning to the facts of the case, the prisoner received a cheque for the proceeds to a violation of the statute. He gave them to his agent, who rightly convicted.

LUSH, J. The prisoner's letter to the prosecutrix, in which the bonds, was a direction in the course of doing the thing of the

his first letter of the 12th November. He accordingly receives instructions to buy, and various securities are bought. It seems immaterial to consider whether any privity of contract was established between the prosecutrix and the sellers. There is at any rate no doubt that the prisoner must have made himself personally liable to them, and therefore he would have a right, after paying for shares, if he did pay, to refuse to hand them over till he was repaid. He would also have a right to require cash beforehand, so as to keep him out of advances. In this state of things, he writes his letter of the 27th November, and the prosecutrix her answer of the same date. Now, looking at the facts and writing down what seems to have been her meaning as to the cheque, I have no doubt as to what it must be: "Inasmuch as there is a sum of 336*l.* which I have to pay to get the Japanese bonds, get the proceeds of the cheque in the way most convenient to yourself and pay for the bonds." I think if the prisoner had handed over the cheque itself, or handed over the actual notes received for it, he would have been within his instructions. I think he would have been so also, if he had paid it into his own bank *bona fide*, for the purpose of meeting a cheque of his own given to the seller, although a hundred things might intervene to prevent the cheque being actually met. I think, then, that the prosecutrix's letter was a direction to apply the cheque or its proceeds to getting the bonds for her free from any lien or claim on the part of the seller.

Turning, then, to the statute, and applying its words to the facts of the case, we find that the prisoner was an agent and he received a direction in writing to apply the cheque or its proceeds to a certain purpose. And the jury have found that in violation of good faith, and contrary to that direction, he applied them to his own use. I have no doubt, therefore, that he was rightly convicted.

LUSH, J. The only question reserved is, whether Mrs. Spooner's letter of the 27th November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese bonds, was, under all the circumstances of the case, a sufficient direction in writing within the statute. And looking at the course of dealing between the parties, I think the natural meaning of the prosecutrix's letter is: "If you have not paid for the

bonds, use the cheque or its proceeds to pay," and therefore the prisoner was rightly convicted.

POLLOCK, B., and HONYMAN, J., concurred.

*Conviction affirmed.*

Attorneys for prosecution, *Wilkinson & Son*; attorney for prisoner, *R. King*.

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### CORY vs. STATE.

55 Ga., 236.)

EMBEZZLEMENT: *Foreign corporation—Mistake in transcript of indictment.*

A statute against embezzlement from "any corporate body in this state" does not extend to or include foreign corporations doing business in the state without authority of law.

The transcript of a count in an indictment before the supreme court apparently showing that the embezzlement was charged as done "with" instead of "without" the consent of the owner, the court must regard the count as fatally defective.

JACKSON, J. The defendant was indicted as cashier of the branch office of the Freedman's Saving and Trust Company, in Atlanta, Georgia, for the offense of embezzlement in secreting and stealing over \$8,000 of money deposited in said branch office, and the indictment was framed on section 4421 of the Code. The question for our review is, whether the cashier of the branch office of said company in Atlanta is subject to the penalties and punishment prescribed in that section of the code, and the answer to that question depends upon the answer to this: was that branch bank or branch office a corporate body in this state in the sense of the statute?

1, 2. The Freedman's Saving and Trust Company is a corporation chartered by congress and located in the city of Washington. The charter gives it no power to establish a branch anywhere. No act of congress, outside of its charter, gives it such power, nor has the legislature of Georgia granted it the franchise to locate a branch for the transaction of its business within the limits of this state. Its existence as a corporation, created by congress and located in the city of Washington, will be recognized by our courts; but its existence as a corporate body, located any-

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where in Georgia, must depend upon the power granted in its charter by congress, or some other constitutional act of congress, or some statute of Georgia. We have been cited to no such law, and we know of none. It is not the policy of the state to encourage the location in our midst of the branch offices of foreign corporations, and the criminal statutes should not be so enlarged by construction as to embrace such branches located here without authority of law. Section 421 of the Code was designed to protect our own corporate bodies, chartered by our state, and doing business here under the authority of this state in the exercise of franchise granted by it, and to punish the officers of such corporations for embezzling the funds thereof. The section actually puts such corporations upon an equality with the public departments of the state government, and of the counties, towns and cities of the state, and imposes upon the officers of all alike the same punishment, thus throwing the ægis of its protection around all its corporations as around its counties, towns, cities, and the various departments of its own government. It reads thus: "Any officer, servant, or other person employed in any public department, station or office of government of this state, or in any county, town or city of this state, or in any bank or other corporate body in this state, or any president, director or stockholder of any bank, or other corporate body in this state, who shall embezzle," etc. Now can it be seriously contended that the legislature meant to include in this section a corporate body in this state exercising franchises here without her authority, and without the sanction of any law, state or federal? Did she mean to protect the exercise of franchises within her limits, which no law making power recognized by her ever granted, and to place such franchises thus illegally exercised upon an equality with those granted by herself and upon an equality, too, with her own departments of the state government? We cannot think so; and if she did not so mean in the section of the code quoted, and on which the indictment is framed, the defendant was certainly convicted on this count without authority of law. It is vain to argue that the change of the words "of this state" when applied to the departments of government and to the counties, towns and cities in the section to the words "in this state" when applied to the corporate bodies has any significance. Wherever the banks are elsewhere referred to in



this division of the code, they are described as banks in this state, and in such connection as to make it unmistakable that the legislature meant banks chartered by this state. See Code, secs. 4426, 4427. It is a fundamental principle of the common law that penal statutes should be construed strictly. It is scarcely necessary to invoke this rule of construction here. It would require an extremely liberal construction to bring the officer of a corporate body illegally located in the state within the purview of this statute.

3, 4. But there is a second count in the indictment, and the punishment under the second is the same as under the first count; it is therefore said that the verdict of guilty, being general, may be predicated upon either count. That may be so, and as we recognize the Freedman's Saving and Trust Company as an artificial person living in the city of Washington, and some of whose property may have got into Georgia, and somebody entrusted with it here may have stolen it, and as this second count is framed upon section 4422 of the Code, which punishes any bailee who thus steals after a trust, we do not see why this defendant could not be punished under the facts proven in this case under that section. We regret, therefore, that on examining the transcript of the record, we find that this count, as it appears there, is bad, it being alleged that the fraudulent conversion of the money was made *with* the consent of the owner. Of course no crime is charged in such a count, and there can be no legal conviction upon it. It is said that the clerk, in copying the bill of indictment, made a mistake and wrote "with" when he should have written "without the consent of the owner." This may or may not be true. It has not been verified to us in the only way it can legally be done, by the suggestion of a diminution of the record on or before the calling of the case. Code, section 4282, rule 9. Our only course is to adhere to the law, and to rule on principle. It may sometimes work seeming injustice; a departure from it would open the flood-gates of speculation, and unsettle the entire practice of the court. In this case any wrong done can be but temporary; the party can be tried again, and if found guilty on the second count properly framed, he can be punished according to law.

Let the judgment be reversed, and a new trial granted.

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## EX PARTE JOHN WHITE.

(49 Cal., 433.)

## EXTRADITION.

*Fugitives from justice.*

The governor of this state has no authority to surrender a fugitive who has committed a crime in another state, unless judicial proceedings have been commenced against him for the crime in the state in which it was committed.

*Arrest of fugitives from justice.*

A person cannot be arrested here for a crime committed in another state, unless a prosecution has been commenced, and is pending against him for the alleged crime in the state having jurisdiction of the offense.

*Constitutionality of law concerning fugitives from justice.*

The court say, without passing authoritatively on the point, that no reason is perceived why a law allowing fugitives from justice fleeing from another state to be arrested here and delivered up to the authorities of the state having jurisdiction of the offense, is not constitutional.

On the 18th day of January, 1875, a warrant was issued by the chief justice of the supreme court, for the arrest of the petitioner White. The warrant was issued on an affidavit of Daniel Coffey, which alleged that, on or about the 1st day of December, 1874, at the city of Boston, state of Massachusetts, White stole three gold watches, of the value of \$300, and that, to escape punishment, he fled from the state of Massachusetts, and had taken refuge in the state of California.

The other facts are stated in the opinion.

CROCKETT, J. The petitioner has been brought before us on a writ of *habeas corpus*, and it appears from the return of the chief of police, that he is held under a warrant of arrest issued by a magistrate having authority to issue such writs. It further appears that there was presented to the magistrate, before and at the time of issuing the warrant, an affidavit made in this state, to the effect that the petitioner had committed the crime of grand larceny in the commonwealth of Massachusetts, and is a fugitive from justice from that state. But it was not shown, by the affidavit or otherwise, that a prosecution is pending or has ever been instituted in Massachusetts against the petitioner for the alleged offense.

Section 1548 of the Penal Code provides that "a person charged in any state of the United States, with treason, felony, or other

crime, who flees from justice, and is found in this state, must, on demand of the executive authority of the state from which he fled, "be delivered up by the governor of this state." Under this section, it is evident the governor has no authority to surrender a fugitive, unless he has been "charged" with crime in the state from which he fled. A prosecution must have been instituted there, before the governor can act. Section 1549 provides that "a magistrate may issue a warrant for the apprehension of a person so charged, who flees from justice, and is found in this state," and the seven next preceding sections provide what steps shall be taken for the detention of the fugitive until a requisition shall be made for his surrender by the proper authorities of the state from which he fled.

The first point for consideration is, whether this case comes within the provisions of the statute, and we are convinced it does not. It was not intended that a person might be arrested here upon an affidavit or information charging him with the commission of a crime in another state, when no prosecution has been commenced there, and may never be. He is not a fugitive from justice in the sense of the statute, unless, at the time of his arrest, there be a pending prosecution against him for the alleged crime, in the state having jurisdiction of the offense. Section 1550 tends strongly to support this view when it provides that at the examination before the committing magistrate, "an exemplified copy of an indictment found, or other judicial proceedings had against him in the state in which he is charged to have committed the offense, may be received as evidence before the magistrate." The statute contemplates a case in which a prosecution is pending in another state and the fugitive is found in this state, and may escape punishment unless he shall be detained until sufficient time shall have elapsed to procure and forward a requisition for his surrender. But, as already stated, it is not applicable to a case in which no prosecution is pending in the state having jurisdiction of the offense. This view of the law renders it unnecessary for us to decide whether these provisions of the penal code are unconstitutional; but without pronouncing an authoritative opinion on the point, it may not be improper for us to say that no reason occurs to us, and none has been suggested at the argument, why it is not competent for the legislature to provide for the arrest and detention of a fugitive from justice

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until his surrender shall be demanded in accordance with the constitution and laws of the United States.

Ordered that the prisoner be discharged from custody.

WALLACE, C. J., and McKINSLEY, J., concurred specially in the judgment.

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EARP vs. STATE.

(55 Ga., 136.)

EVIDENCE: *Confessions.*

Where an officer promised respondent, a girl of fourteen, that if she would tell, she should not be hurt, and she thereupon confessed her guilt, it was held that the confession was inadmissible, as not having been made voluntarily.

Where a confession which is inadmissible because not voluntarily made is admitted without objection, it is nevertheless the duty of the court to exclude the confession from the consideration of the jury by his charge, if so requested.

JACKSON, J. Cass Earp, the defendant, is a negro girl, some fourteen years old. She was charged and convicted of murder, in throwing a little colored child, two years old, into the river. The child was found dead some week or so afterwards, lower down the river, in a fish trap. The evidence was purely circumstantial, and hardly sufficient to authorize a conviction without the aid of defendant's confessions of guilt. Those confessions were, that she threw the child into the river, but they were reluctantly made by her, and before she made them she said: "If I tell you, won't you hurt me?" to which the reply of the constable was, "No, you shan't be hurt; I came here to arrest you, and you shan't be hurt." This promise was repeated to her upon her hesitating and asking the question again, and then and only then, did she make the confession. The confession went to the jury without objection, and her counsel requested the court to charge, "that in order to make her confessions evidence against her, it must appear to the satisfaction of the jury that such confessions were made voluntarily, without being induced by another, by the slightest hope of benefit, or the remotest fear of injury." The court refused so to charge, and this was the main ground of the motion for new trial, which was refused, and error is assigned

thereon. The Code declares, "to make a confession admissible, it must have been made voluntarily, without being induced by another, by the slightest hope of benefit, or remotest fear of injury." The request is, therefore, in the very language of the code, and should have been given to the jury, unless the defendant forfeited her right to the charge by the failure of the counsel to object to the confession, or to move to rule it out. The court below put his refusal upon this ground, and the naked question is, Should a conviction for murder stand upon illegal evidence because it went to the jury without objection, when the court's attention was called to it, and he was requested to charge the law thereon, and wholly failed to do so? We think that it should not stand, but that the unhappy and doubtless guilty girl, should have another chance for her life, and if convicted, should be convicted according to law.

A motion to rule out the evidence would have been the safer and better practice; but if admitted, we think the law should go to the jury with it, that it might have only the weight to which it is entitled. The girl here evidently hoped that she would make something by her confession, for the great man of the company, in her eyes, the constable, assured her that she should not be hurt, after she had expressed her apprehensions that they would hurt her. Besides, some of the witnesses heard the promise of the constable that she should not be hurt, and others did not, and the testimony of the latter was in before it was certain that such hopes were held out to induce the confession, and in such case the counsel might well prefer not to rule out the evidence, as it was already in, but to ask the instructions of the court thereon. At all events, the circumstantial evidence, without the confessions, would scarcely justify the hanging of this defendant; and if her confessions were illegally extorted from her, she ought not to suffer the death penalty. Besides, we think this court has substantially ruled the point in issue. See *Holzenbake v. The State*, 45 Ga., 47; *Stallings v. The State*, 47 id., 572; and *Nathan Irwin v. The State*, 54 id., 39. These cases leave this no longer an open question in this court. Let the judgment be reversed on the ground that the court erred in not granting the new trial on the ground predicated upon the refusal to charge as requested.

*Judgment reversed.*

#### EVIDENCE

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## NEWMAN vs. STATE.

(49 Ala., 9.)

EVIDENCE: *Confessions — Disqualification of judge by relationship.*

The person with whom a prisoner had been living for two years said to him, "Tom, this is mighty hard; they have got the dead wood on you and you will be convicted," and at the same time said something about "owning up." The prosecutor said to the prisoner, "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty and let some one who is guiltier go free; it may go lighter with you." *Held*, that confessions made under the influence exerted by this language could not be regarded as voluntary, and are inadmissible. A judge who is related to the prosecutor by marriage is not incompetent to sit in the trial of a criminal case. He is not related to a party.

FROM the Circuit Court of *Henry*. Tried before the Hon. J. McCaleb Wiley.

The indictment in this case charged that the prisoner, "Thomas, *alias* Tom Newman, broke into and entered the store of J. D. Freeman & Co., which said firm was composed of J. D. Freeman and Ephraim Oates, and in which said store merchandise of value was and is kept for use, sale or deposit, with intent to steal." "On the trial," as the bill of exceptions states, "the state introduced J. D. Freeman as a witness, who testified in substance as follows: The firm of J. D. Freeman & Co. is composed of Ephraim Oates and myself. We carry on a family grocery and confectionery in the town of Abbeville, in said county, and keep goods of value for sale in said store. On the morning of the 2d day of May, 1872, I opened and went into the store at the usual time, and on entering, found that the back door had been forced open during the night. I then proceeded to examine the goods, and found that a quantity of cigars, tobacco, coffee, flour, money and other things had been taken therefrom. I estimated that the money, with the value of the goods lost, amounted to about \$35. A few days afterwards, I sued out a warrant against the defendant, and, in company with the sheriff and one J. W. Stokes, went to the house occupied by the defendant, who was then in the employment of said Stokes, and was living in a small house on his place. The sheriff and I entered the defendant's house, and sent said Stokes to the field where he was at work, to bring him to the house. In a short

time they came into the house together, and I told the defendant that I wanted to examine his box, or chest; that I thought he had some of my goods in it. He denied having the goods, and gave us the key to his box or chest. We opened and examined said box, and found it to contain about half a box of cigars and some tobacco, which I at once recognized as a portion of my stock. The sheriff then arrested the defendant under the warrant which he had against him. I then asked the defendant where he got the tobacco and cigars, and he replied that he got the cigars from Mr. Asher and the tobacco from Mr. J. M. Calloway. He was then informed that Mr. Asher had no such cigars and Mr. Calloway no such tobacco, and that he would have to prove that he got the cigars and tobacco from them. I then said to the defendant, 'These cigars and this tobacco are mine; I will identify them, and you had as well own it.' The witness then proceeded to state the confession of defendant, made at the time, and under the above circumstances; to which objection was made by defendant, which objection was overruled, and the defendant excepted. The witness then proceeded to state the following: 'After the above conversation between the defendant and myself, he stated to me that he had got the goods out of my house; that he and his brother, while standing at Kimbrough's well, heard a noise over at the store; that they went over there to see about it, and found the back door of the store open, and he went in and took the cigars and tobacco.' After the above, I told defendant, 'You are very young to be in such a difficulty as this; there must have been some one with you who is older than you, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free; that it might go lighter with him.' The witness then proceeded to state other confessions made by defendant to him at this time, but the court, *ex mero motu*, refused to allow the witness to state such confessions, to which the defendant excepted. The witness then testified, 'I think this conversation took place after the confession hereinbefore set out.'

The State then introduced said J. W. Stokes as witness, who testified as follows, in substance: "On seeing the defendant in possession of cigars and tobacco, my suspicions were aroused against him, and I thought that he had something to do with, or

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knew of the burglary which had been recently committed. The defendant was in my employ at the time, and was living in a small house on my premises. I communicated to J. D. Freeman certain facts relative to some cigars and tobacco which I saw in the defendant's box, and he and the sheriff and myself, after he had procured a warrant for the defendant's arrest, went to the defendant's house. The sheriff and said Freeman went into his house, while I went to the field after him. While coming from the field with him, I told him that Mr. Freeman was at his house, and wanted to examine his box, and see whether he had any of his property; that he suspected him of having some of the goods. Defendant replied that he had nothing belonging to Mr. Freeman, and that he was willing for him to look and see. On arriving at the house, defendant gave up the key to his box; and we found, on examination, that said box contained a lot of cigars and tobacco, which said Freeman identified as his. I then remarked to the defendant, "Tom, this is mighty bad; they have got the dead wood on you, and you will be convicted;" and asked him where he got the cigars and tobacco; to which he replied, that he got the cigars from Mr. Asher, and the tobacco from Mr. Calloway. I then told him that he would have to prove where he got them, and that said Calloway had no such tobacco; and said something to him about owning up. The defendant then stated that he and his brother, while standing at Kimbrough's well, heard a noise, looked over the fence, saw the store door open, went over there, and went in; that he took the cigars and tobacco, and his brother took the money. We then sent said Freeman to obtain a warrant against defendant's brother; and about half an hour after he had left, the sheriff took defendant, and started with him to jail. After we had left the house, and were at the gate, I told defendant that he had been living with me nearly two years; that there was no necessity for him to have stolen the cigars and tobacco, as I had always furnished his tobacco, that we would then separate; that I could have nothing to do with any one who had acted so badly, and, if he had anything to say as to my assisting him in the difficulty, to do so. Defendant then proceeded to confess, that his brother bored the hole, and forced open the door, and he watched for him while this was being done, that they entered the store, and he took the cigars and tobacco, and his brother took the money. The de-



defendant moved the court to exclude this confession; the court overruled the motion, and the defendant excepted.

On cross-examination, said witness testified as follows: "The defendant is a negro boy about eighteen years of age, and of only ordinary intelligence. I was present, and heard the conversation which took place between said Freeman and the defendant. I think the language addressed by said Freeman to defendant, to wit: "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it was; that it was not right for him to suffer the whole penalty, and let some one who is guiltier go free; that it might go lighter with him," was used before defendant had made any confession at all, and before he had acknowledged anything. The defendant then moved the court to exclude such and every confession which had been admitted against him; the motion was overruled, and the defendant excepted.

The witness Freeman stated, on cross-examination "that he had married the niece and grand daughter of the presiding judge," and the defendant thereupon, "by his counsel suggested the incompetency of the judge to try the case, on account of his relationship to one of the parties, and moved to discontinue the trial." The court overruled the motion, and the defendant excepted. After conviction, the defendant renewed his objection to the competency of the presiding judge, and excepted on that ground to the sentence and judgment of the court.

*W. C. Oates*, for the prisoner.

*Ben. Gardner*, Attorney General, *contra*.

PECK, C. J. Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. 1 Greenl. Ev., § 249. A confession obtained from an accused person, in the custody of his accusers "by the flattery of hope, or the torture of fear, is not, in contemplation of law, voluntary, and should not be received as evidence of guilt, and no credit ought to be given to it. The books are full of examples and instances, showing us in what cases confessions have been held to be inadmissible, as not voluntarily made. Thus, where the constable who arrested the prisoner said to him, "It is no use for you to deny it, for there are the man and boy who will swear they saw,

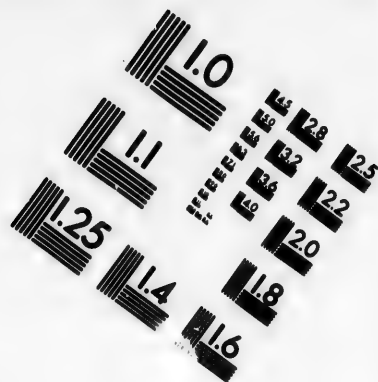
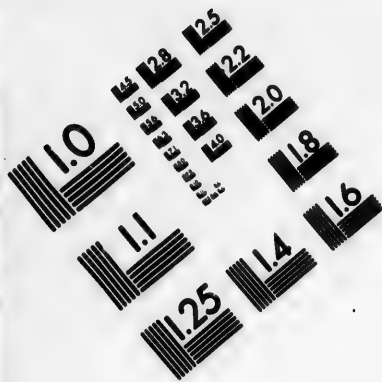
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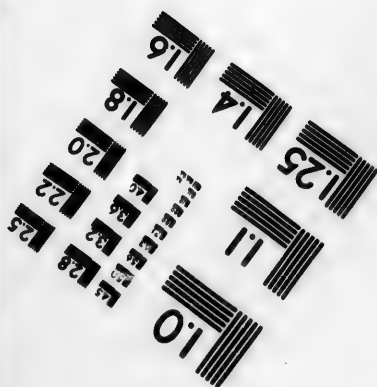
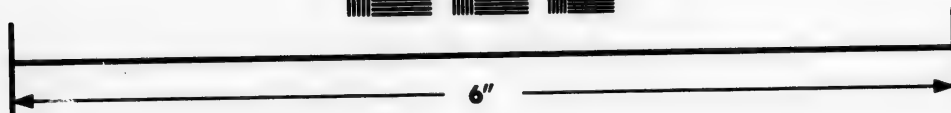
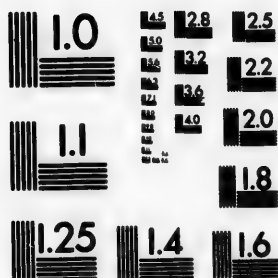
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you do it." So, where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account, I will take you before a magistrate." So, also, where a girl, thirteen years old, was charged with administering poison to her mistress, with intent to murder, and the surgeon in attendance had told her, "It would be better for her to speak the truth," it was held that her confession, thereupon made, was inadmissible. So, again, where the prisoner's superior in the post office said to the prisoner's wife, while her husband was in custody for opening and detaining a letter, "Do not be frightened; I hope nothing will happen to your husband beyond the loss of his situation;" the prisoner's subsequent confession was rejected, it appearing that the wife might have communicated this to the prisoner. These are some of the cases given, in which confessions were rejected on the ground that they were not voluntarily made. 1 Greenl. Ev., § 220, and notes.

Now, comparing the circumstances under which the prisoner's confessions were made with the cases cited, it seems to me his confession must be rejected as involuntary. He must be supposed to have been alarmed by what was said to him, and thereby induced to believe the parties into whose hands he had fallen could and would, by some means, effect his conviction, and that the best thing he could do was to make a confession. This, I think, is clearly to be inferred from what was said to him by the prosecutor and the witness Stokes. After the prisoner's box had been examined, and cigars and tobacco found, which the prosecutor identified, and claimed as belonging to him, the witness Stokes said to the prisoner: "Tom, this is mighty bad; they have got the 'dead wood' on you, and you will be convicted," and, at the same time, said something to him about "owning up." This witness, with whom the prisoner had been living for about two years, also said to prisoner he could have nothing to do with one who had acted so badly, and if he, prisoner, had anything to say as to his assisting him in the difficulty, to do so. The prosecutor, who claimed the articles — the cigars and tobacco found in the prisoner's box — said to him at the same time: "You are very young to be in such a difficulty as this; there must have been some one with you who was older, and I, if in your place, would tell who it was; it is not right for you to suffer the whole penalty, and let some one who is guiltier go free,



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that it might go lighter with him." I have no hesitation in saying that confessions obtained under such influences ought not to be regarded as voluntary, and should be rejected. When it is considered that the prisoner is a negro boy, about eighteen years old, of ordinary intelligence, and necessarily ignorant, suddenly arrested and in custody, charged with a grave offense and surrounded by the prosecutor and others, who had been active in procuring his apprehension, no one can understand the extent of the influence that may have been produced on his ignorant mind by what was said to him. Most probably he was induced to believe that, by making a confession, in the language of the prosecutor, "it would go lighter with him." The objection to the admissibility of the prisoner's confessions, obtained under the circumstances disclosed in the bill of exceptions, should have been sustained.

The objection made to the competency of the presiding judge was properly overruled. He was not interested in the cause, nor related to either of the parties. Revised Code, § 635. His relationship to the prosecutor did not affect his competency.

*Judgment reversed and remanded.*

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### PEOPLE *vs.* BARRIC.

(49 Cal., 342.)

#### EVIDENCE OF INCORPORATION: *Confessions — Accomplice.*

On the trial of an indictment for stealing from a corporation, evidence that a company known by the name given in the indictment is a corporation *de facto* doing business is sufficient evidence of incorporation.

Where a prosecuting witness, who testifies to confessions made in the presence of himself and the sheriff, testifies in a preliminary cross-examination that it is possible that something was said about its being better for the prisoner to make a full disclosure, it was *held*, that the confession was inadmissible.

Before confessions made to one in authority can be received in evidence, it must appear affirmatively that they were made voluntarily.

One who purchases stolen goods from a thief, with money furnished by an officer, with a view of bringing the thief to justice, is not an accomplice.

The fact that a defendant did not move for a new trial in the court below will not bar a new trial, on the reversal of an erroneous conviction by the supreme court.

APPEAL from the County Court of *Santa Clara County*.

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sive mines of quicksilver, which have been worked for many years by the "Quicksilver Mining Company of New York." The defendant was charged in the indictment with having, on the 3d day of February, 1874, stolen ten flasks and three soda bottles containing quicksilver, the property of said corporation. The prosecution, on the trial, called as a witness Charles W. Hinman, who testified that he had lived in Santa Clara county a number of years, and that, while in Mazatlan, Mexico, some two years before the trial, he saw soda bottles, which were manufactured for a man in Santa Clara county, for sale, containing quicksilver, and that he knew the quicksilver must have been stolen. That, on the 5th day of February, 1874, defendant came to him and inquired if he did not want to make a speculation, and informed him that he could sell him quicksilver, and said further: "you are engaged in silver mining in Nevada, and need quicksilver." That the witness encouraged him with hopes that he might buy, but told him he had not got the money to pay for it. That the witness immediately went to the sheriff's office, and informed the sheriff of what had taken place, and it was arranged that the witness should buy the quicksilver, and the sheriff should furnish the money. That the witness had several interviews with the defendant, and agreed to buy the quicksilver at fifty cents per pound. That the defendant delivered it at the witness' place of residence in San José, soon after the first conversation, and told witness that it was stolen, and witness paid him for it with money furnished by the sheriff. It appeared by the testimony of two other men that Barric had hired the guard at the mine to steal the quicksilver for him in the night. It did not appear from the record but what the theft had been committed before Hinman had his first conversation with the defendant. A flask of quicksilver contained  $76\frac{1}{2}$  pounds, and it was worth \$1.20 per pound. The flasks were made of iron. The only other testimony was that of Rondel, the superintendent of the mine, who testified that the defendant confessed that he was guilty, in the sheriff's office, to him and the sheriff and his deputy. When Rondel was asked by the prosecution to relate the confession, the attorney for the defendant obtained leave of the court to ask him some preliminary questions, as to whether the confession was voluntary. These questions, and the reply of the witness, are

stated in the opinion. The counsel for the defendant then objected to the confession being received in evidence, because it was obtained under inducements held out by the sheriff. The court overruled the objection. The court charged the jury that a conviction could not be had on the testimony of accomplices alone. The defendant was convicted, and appealed.

*Collins & Burt*, for the appellant, argued that, excluding the confessions testified to by Rondel, there was no testimony except that of accomplices, contending that Hinman was an accomplice. As to Rondel's testimony, they argued that it should have been excluded, and cited *People v. Jones*, 31 Cal., 567; *People v. Henessy*, 16 Wend., 147; *People v. Badgley*, id., 53; and *Mayor, etc., of N. Y. v. Walker*, 4 E. D. Smith, 258.

They also argued that it was error to admit parol evidence that the company known by the name of the "Quicksilver Mining Company of New York" was doing business as a corporation *de facto* in California, but contended that proof should have been made that the laws of New York allowed corporations to be formed there for quicksilver mining, and that the corporation had an existence there.

*Moore, Lanie, Delmas & Leib*, for the people, argued that the confession of the defendant was voluntary, and that there was no error in admitting the testimony as to the corporation, and cited *People v. Hughes*, 29 Cal., 257; *People v. Frank*, 28 id., 507; and *People v. Ah Sam*, 41 id., 645.

McKINSTRY, J. Defendant was indicted for feloniously stealing quicksilver, the property of the "Quicksilver Mining Company of New York."

The prosecution proved by the witness Rondel that the company known by the name given in the indictment was a corporation *de facto*, doing business as such. This was sufficient. *People v. Frank*, 28 Cal., 507; *People v. Hughes*, 29 id., 257; *People v. Ah Sam*, 41 id., 645.

The witness Hinman was not an accessory before the fact. It does not appear from the transcript that he knew anything of the alleged crime until after it was committed.

The confession testified to by Rondel, the superintendent of the company, in the sheriff's office, and in the presence of the sheriff and his deputy is to be regarded as if made to the sheriff.

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The following is a transcript from the record.

"Q. Did you say to him that it would be better for him to make a full disclosure?

"A. I don't know but that something of that kind might have been said.

"Q. Do you know by whom?

"A. I do not know.

"Q. But by some one of you?

"A. It may have been said.

"Q. Isn't it your impression that some such remark was made to him?

"A. It is possible."

The witness was then permitted to detail the confession notwithstanding the objection of defendant.

"Before any confession can be received in a criminal case, it must be shown that it was voluntary. The course of practice is, to inquire whether the prisoner had been told that it would be better for him to confess, or worse for him if he did not confess, or whether language to that effect had been addressed to him." 1 Greenl. Ev., 219. The court below should have been satisfied that the confession was voluntary; certainly the preliminary testimony was of a nature to excite the gravest suspicion that improper inducements had been held out to elicit it. But the testimony affirmatively established the inadmissibility of evidence of the confession. It would be substituting sound for sense to say that the prosecuting witness did not in effect declare that the sheriff or his deputy, or he himself in their presence and hearing, said to the prisoner, "It will be better for you to make a full disclosure."

The rule is without exception that such a promise made by one in authority will exclude a confession. Public policy absolutely requires the rejection of confessions obtained by means of inducements held out by such persons. It may be true, even in such cases — owing to the variety in character and circumstances — that the promise may not in fact induce the confession. But as it is thought to succeed in a large majority of instances, it is wisely adopted as a rule of law applicable to them all. *Id.*, 222, 223, and cases cited.

We cannot too strongly urge on the district attorneys never to offer evidence of confessions, except it has first been made to



appear that they were made voluntarily. We ought not to be compelled to reverse a judgment because of a violation of so well established a rule of law.

The defendant asks to be finally discharged because he did not move for a new trial in the court below. But the question suggested by this application has been passed upon by this court, and we see no good reason for disturbing the former ruling. *People v. Otwell*, 28 Cal., 456.

Judgment reversed and cause remanded for new trial.

Neither Mr. Justice CROCKETT nor Mr. Justice RHODES expressed an opinion.

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STATE vs. GRAHAM.

(74 N. C., 646.)

EVIDENCE: *Confession.*

A prisoner, arrested for larceny of growing corn, was compelled by the officer who arrested him to put his foot into a fresh track in the field where the corn was growing. It was held proper for the officer to testify as to the correspondence between the prisoner's foot and the track, and that the evidence should not be excluded, because obtained through fear or force.

Confessions obtained through fear or hope are inadmissible, because the fear or hope may so influence the prisoner's mind as to induce him to make false statements. But if independent facts or circumstances are learned through force, fear or hope, evidence of the facts or circumstances is admissible, because the fear or hope operating on the prisoner's mind can have no tendency to distort them.

RODMAN, J. The first exception is, because the judge permitted the officer who had the prisoner in custody to testify that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *The State v. Jacobs*, 5 Jones, 259, is cited.

The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by

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those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury, and fit for their consideration.

Evidence of this sort, called by the civilians "real evidence," is always admissible, and is of greater or less value, according to the circumstances. In Best on Evidence, sec. 183, the following instances of its value are given: "In a case of burglary, where the thief gained admittance into the house by opening the window with a pen knife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the wound consisted of part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber in the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception, however, is that the officer made the prisoner put his foot in the track, in order to test the resemblance. It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were will be received, provided the goods were found at the place described. *Reg. v. Gould*, 9 C. & P., 364; *Duffy v. People*, 25 N. Y., 588; *White v. State*, 3 Heisk., 338; *Selidge v. State*, 30 Tex., 60.

The fact of the goods being found in the place described, proves that he knew where they were, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with

the crime charged, or which may be required as evidence. *Roscoe Cr. Ev.*, 211; *R. v. O'Donnell*, 7 C & B., 138 (32 E. C. L. R.); *R. v. Kinzey*, id., 447; *R. v. Burgess*, id., 488; *R. v. Rooney*, id., 515.

If an officer who arrests one charged with an offense has no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment of paper corresponding with the wadding, have been found. If, when a prisoner is arrested for passing counterfeit money, the contents of his pockets are secured from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter*? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face, may not the court order its removal in order that the witness may say whether he was the person whom he saw commit the crime?"

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during his trial?

We conceive that these questions admit of but one answer, and that one is consistent with the general practice.

We concur with the judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoes would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

*Judgment affirmed.*

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## STATE vs. SCANLAN.

(58 Mo., 204.)

EVIDENCE: *Question of fact — Capacity of child as witness.*

A girl whom the court by inspection determined to be between nine and ten years old, being offered as a witness, was objected to. Being examined as to her qualifications, she appeared very nervous and frightened, and said she could not tell her age, and did not know the nature or obligation of an oath, or what the consequences would be of swearing falsely. On a re-examination she said she was the daughter of the respondent, knew her prayers, could read some, believed in God, and thought it wrong to tell lies: *Held*, that she was properly received as a witness.

The question of the competency of a witness is a question of fact, to be determined by the trial judge by personal inspection and oral examination, and his decision is not subject to revision.

LEWIS, J. The defendant was convicted of murder in the first degree, committed upon his wife, and sentenced to death. His appeal to this court brings us but one question for review. This appears in the following extract from the bill of exceptions:

"The state then offered as a witness, in behalf of the prosecution, Mamie Scanlan. Upon being thus presented, the defendant objected to her being sworn and examined because of her tender years; whereupon she was examined by the judge respecting her qualifications as a witness; and upon this examination, the child, being much frightened and scarcely able to speak, stated to the judge that she could not tell her age, that she did not know the nature or obligation of an oath, nor what would be the consequences of false swearing. The answers of the child to the questions of the judge were invariably in monosyllables, yes or no, and uttered in a tone scarcely audible. Upon the first examination, the judge refused to have her sworn. Upon a re-examination, however, the court, from inspection of the witness, judged her to be between nine and ten years of age; and having partially recovered from a fright occasioned by surroundings entirely new to her, the judge ascertained from her statements that she was the daughter of the defendant, that she knew her prayers, could read some, believed in God, and thought it wrong to tell lies. She further stated that she was present at the time her mother was injured by the defendant. And thereupon the judge directed the witness to be sworn as a witness in the case. To

which decision of the court, allowing said witness to be sworn, the defendant, by his counsel, then and there excepted."

We find here nothing which by any rule of law or practice will permit us to interfere with the verdict. The ruling of the criminal court embodied no proper subject for appellate revision. The capacity or incapacity of the child as a witness, in certain essential particulars, was a question of fact which the judge determined upon personal inspection and oral examination. If any principle of law had been declared by him, as that, although found incapable of discriminating between truth and falsehood, the law made her, nevertheless, a competent witness, that might well be brought here for review. But I can find no case in which it is held proper for an appellate court to review the finding of fact. The contrary rule is declared by all respectable authorities. No hardship necessarily results; for if the judge should chance to err in his conclusion, the jury hold a powerful corrective in their right to pass upon the credibility of the witness, as tested on the stand by the usual appliances.

But aside from this view—with which, were not a human life involved, we might easily dismiss the subject—we cannot discover any reason to doubt the entire propriety of the court's permitting the witness to testify.

The history of criminal procedure in this and the mother country abounds in illustrations of a judicial care which seeks to secure, on the one hand, whatever pertinent testimony may bring a guaranty of conscious moral responsibility, and on the other, to admit none that may be offered without it. Distinctions and general rules have assumed various forms; but the spirit of all, as applied to children of tender years, appears in the simple formula of our own statute. The rule (Wagn. Stat., 1374, § 8) excludes merely "a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

We can discover no token of any such incapacity in the final answers given to the judge by the witness in this case. The course pursued on the occasion was eminently proper. There is a practice sanctioned by time-honored precedent, under which, when a child is found too young to testify with a proper sense of responsibility, the trial may be postponed until the witness shall have been suitably instructed. This, however, has been

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criticised, as like "preparing or getting up a witness for a particular purpose." In the present case, even that objection disappears. While the child was so laboring under nervous agitation from the novelty of the surroundings as to give unintelligible or absurd answers, she was not permitted to testify. The court merely waited for a natural recovery of mental equilibrium, which should permit the true capabilities of the witness to appear. No sign was visible then in her examination that she was incapable either of receiving just impressions of the facts about which she was to testify, or of relating them truly. We can find no error in the record.

The judgment is affirmed; the other judges concur.

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DANIEL vs. STATE.

(55 Ga., 222.)

EVIDENCE: *Memorandum.*

Where a witness refers in his testimony to a memorandum as showing a fact involved in the issue, and states that he has such memorandum in his pocket, it is error for the court to refuse to compel the witness to produce the memorandum.

WARNER, C. J. It appears from the evidence in the record that the defendant claimed an interest in the bale of cotton alleged to have been stolen by him; that he took it publicly in the day time from the gin-house where it was ginned; that he raised the cotton; that the extent of his interest in it depended on the settlement of the accounts between him and Reid. The county court erred in not requiring the witness Reid, to produce the book of account against the defendant, which he admitted he then had in his pocket, inasmuch as he referred to that book of account in his testimony, as containing a statement of the defendant's indebtedness to him.

[The rest of the opinion is not considered of sufficient importance to be given.—  
REp.]

NOTE.—So in *Duncan v. Seeley*, 34 Mich., 369, the court say: "On the trial, the plaintiff, being on the stand, was questioned by his counsel as to the time when he was at the place of the alleged sale after the sale was made; it being deemed important to show that he was there on a certain day. Plaintiff in reply

stated that he could not state positively without looking at something to refresh his memory. And after professing to look, he stated further that what he had looked at did refresh his memory. He was then called upon by defendant's counsel to produce the memorandum at which he had looked, but the counsel for the plaintiff objected, and the court sustained the objection. We think this was erroneous. The witness was in effect testifying, not from recollection, but from something which he professed to have in writing; and the other party had a right to know what the memorandum was on which he relied, and whether it had any legitimate tendency to bring the fact in controversy to mind. It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum. The defendant was entitled to see it at the time, in order to test the candor and integrity of the witness; and the opportunity for such a test might be lost by a delay which an unscrupulous witness might improve by preparing or procuring something to exhibit."

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BENNETT vs. STATE.

(52 Ala., 370.)

EVIDENCE: *Conclusion of fact—Irrelevant evidence—Warehouse.*

It is not competent for a witness who has testified "that he slept in the same room with the prisoner the same night that the crime he is charged with was committed, that the witness was wakeful; that he saw the prisoner go to bed, and found him in bed the next morning when he woke up," to testify further, that in his opinion the prisoner could not have gone out without his knowledge. This would be testifying to an inference of fact which it is the province of the jury to draw.

In a prosecution for larceny, it is not relevant to prove that third parties, who had an opportunity to commit the crime, were of bad character, such third parties not being witnesses, or charged with the crime, or otherwise connected with the case.

A building roofed over, of which one side and one end are planked up, the other side and end being left open so that wagons could drive under, used for storing cotton, and being enclosed, together with about two acres of land, by a tight plank fence, nine feet high, the gates of which are kept locked, is a warehouse.

APPEAL from Circuit Court of Wilcox. Tried before Hon. JOHN K. HENRY.

The appellants were convicted of larceny from a warehouse, under § 3707 of the Revised Code. On the trial one of them sought to establish an *alibi*. A witness for the defense testified that he was very wakeful; that he saw Bennett go to bed in the

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same room in which witness slept that night, and found him next morning when he awoke; that there were two doors to the room; that these were the only openings, and that witness slept near one of them. The defense then "offered to show to the jury, that in the opinion of this witness, defendant could not have left, or got out of the house without witness knowing it." The court refused this offer, and "would not allow said evidence as to the witness' opinion to go to the jury, and defendants duly excepted." In the further progress of the trial, the defendants offered to show that the employees at the warehouse, from which the larceny was committed, but who were not witnesses, or in any way connected with the case, or charged with the theft, "were of bad character." The court refused to allow this proof to be made, and the defendants duly excepted.

The evidence showed that the building from which the cotton was stolen, was a covered structure, used for storing cotton bales. One side and end were planked up, and the other left open, so that wagons could drive under the shed thus formed, to load and unload. The structure, together with two acres of land connected therewith, was inclosed by a close plank fence nine feet high, the gates of which were kept locked. The court charged the jury, if they believed that such was the character of the place from which the cotton was stolen, and that it was used for storing cotton, it was a "warehouse" within the meaning of the statute. The defendants excepted to the giving of this charge. The various rulings to which exceptions were reserved are now assigned as error.

*John McCaskill*, for appellants: The witness' opinion, on facts already given the jury, should have been allowed for what it was worth. 29 Ala., 244; 19 Ohio, 302.

*John W. A. Sanford*, attorney general, with whom *J. Y. Kilpatrick*, contra: The court did not err in refusing to permit the witness to give his opinion. He was not an expert. 8 Watts, 406; 52 Mo., 221; *Whittier v. Town of New Hampshire*, Am. Law Reg., vol. 14, 704.

BRICKELL, C. J. It is peculiarly the province of the jury to draw deductions or inferences from facts, and it is seldom, if ever, permissible for a witness, not an expert, to give his mere opinion—an opinion which is a mere inference from facts—when the



jury are equally competent as to such matter to form the opinion or deduce the conclusion sought from the facts. The witness in this case was not an expert. The matter about which his opinion was sought was, as to an inference from facts, which it required no peculiar skill, or particular fitness or experience to solve. Whether the event could have happened, as to the occurrence of which the witness' opinion was desired, was a matter of which the jury, guided by their observation and experience, and the circumstances of the particular case, were the best and only judges. The question asked went to the merits of the whole case. There is no appreciable difference between the opinion asked for, and a request for the witness' opinion as to whether the *alibi* was proved. The question called for an opinion which was clearly inadmissible, and the court rightly refused to permit the witness to answer. *State v. Garvey*, 11 Minn., 163; *Don Crane and wife v. Town of Northfield*, 33 Vt., 124; *Com. v. Cooley*, 6 Gray, 355; *Pelumourges v. Clark*, 9 Ia., 16; *Walker v. Walker*, 34 Ala., 373.

II. The court did not err in refusing to allow the defendants to show the "bad character" of those in charge of the yard and press. It is expressly stated that they were not witnesses, or charged with the theft, or otherwise connected with the case. Such an issue was wholly foreign to that on trial. The proof offered would have needlessly incumbered the case, served to distract the attention of the jury from the main points involved, and have uselessly wasted the public time. It would be a dangerous precedent to allow a defendant to take up the time of the court in showing that parties living near the scene of the crime, or who had an opportunity to commit it, were of bad character; there often would be no end to the inquiries thus submitted to the jury, and the trial of criminal cases could thereby be protracted, sometimes beyond the term during which the court is authorized to sit. The evidence was inadmissible for another reason. It did not show whether the bad character was as to truth and veracity, or for honesty. If the proposed evidence was as to the character for truth and veracity, it would clearly be inadmissible, where the parties referred to were not witnesses or otherwise connected with the case, even if we could see that evidence of bad character for honesty was admissible.

III. There is nothing in the error assigned as to the charge of

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the court. Under the evidence in this case the structure mentioned was a "warehouse" within the meaning of § 3707 of the Revised Code. *Hagan et al. v. State*, in MS. Besides this, the exception is a mere general exception to the entire charge of the court, not specifying the objectionable parts. In such cases, if any proposition in the charge is correct, the exception is not available.

The judgment of the court below is affirmed.

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WRIGHT vs. STATE.

(50 Miss., 332.)

EVIDENCE: *Deposition before committing magistrates.*

Where the law requires a committing magistrate to take the voluntary confession of the accused in writing, the writing is the best evidence of what statement he made on his examination, and without proof of the loss or destruction of the writing, it is not competent to prove by parol what the accused said on such examination.

PEYTON C. J. It appears that the plaintiff in error in this case was convicted in the circuit court of Hinds county, in the second district thereof, of the murder of one Charles Kelker, and sentenced to be hung, and hence the case comes to this court by writ of error.

Various errors are assigned here in the record of the proceedings and judgment in the court below. But in the view we take of this case, we deem it necessary to notice only the tenth assignment of error, which impeaches the correctness of the ruling of the court, in admitting oral evidence of what the defendant said in his voluntary statement before the justice of the peace, under the circumstances set forth in the record.

It is provided in section 2825 of the code of 1871, that in all criminal cases brought before any justice of the peace, he shall take the voluntary confession of the accused, and the substance of the material testimony of all the witnesses examined before him, in writing, and shall inform the accused of his right to interrogate such witnesses. Which questions, and the answers thereto, he shall also reduce to writing; the said proceedings and testimony, so taken and had, the said justice shall certify and

send up, together with the bonds and recognizances of the accused, and the prosecutor and witnesses, to the next term of the circuit court of the proper county, on or before the first day of the term.

On the trial in the court below, one Daniel Murchison, a witness on the part of the state, was permitted to testify as to what the accused had said in his voluntary statement before the committing magistrate, in opposition to objections from defendant's counsel. Said witness testified that he believed he remembered the substance of said statement, but that other matters might have been mentioned in that voluntary statement which witness did not remember, as he did not pay any very marked attention to the statement, although he was listening to the examination. The said voluntary statement was reduced to writing, and signed by the defendant, and produced in court by the prosecution.

As a general rule, applicable as well in civil as criminal proceedings, the law requires the production of the best evidence of which the case, in its nature, is susceptible. This rule does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for when it is apparent that better evidence is withheld, it is fair to presume that the party has some sinister motive for not producing it, and that if offered, his design would be frustrated. The rule thus becomes essential to the pure administration of justice. In requiring the production of the best evidence applicable to each particular fact, it is meant that no evidence of a nature merely substitutionary shall be received when the primary evidence is produceable.

As the statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, and shall certify and send up the same to the next term of the circuit court of the proper county, on or before the first day of the term, the law *conclusively presumes* that if anything was taken down in writing, the justice of the peace performed his whole duty, by taking down all that was material. In such case, no parol evidence of what the prisoner may have said on that occasion can be received. But if it be shown that the examination was not reduced to writing, or if the written examination is wholly inadmissible,

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by reason of irregularity, parol evidence is admissible to prove what he voluntarily disclosed. And if it remains uncertain whether it was reduced to writing by the magistrate or not, it will be presumed that he did his duty, and oral evidence will be rejected. 1 Greenl. Ev., 259, sec. 227.

Oral evidence cannot be substituted for any instrument in writing (which is not merely the memorandum of some other fact), the existence of which instrument is disputed, and its production material to the issue between the parties, or to the credit of the witnesses. One advantage derived from the application of this rule is, that the court acquires a knowledge of the whole contents of the instrument, which may have an effect very different from a statement of a part. "I have always," says Lord Tenterden, in the case of *Vincent v. Cole*, M. & M., 258, "acted most strictly on the rule that, whatever is in writing shall be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments. They may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rules."

This rule, however, does not apply where the instrument in question is shown to be destroyed or lost, or where the party who relies upon it is otherwise incapacitated from producing it.

In the case under consideration, the record shows that the voluntary statement of the accused was taken in writing, and that being the primary and best evidence of what that statement was, should have been produced, and the oral evidence of the witness as to what the prisoner stated on that examination, being secondary and inferior evidence, ought not to have been received on trial of the prisoner. *Peter v. State*, 4 S. & M., 31.

In the admission of this parol evidence on the trial of the case below, the court erred.

For this reason, the judgment will be reversed, the case remanded, and a new trial awarded.

MIDDLETON *vs.* STATE.

(52 Ga., 527.)

EVIDENCE: *Corroboration of accomplice.*

On a trial for felony, a conviction cannot be had on the testimony of an accomplice, unless such testimony is corroborated, and the corroboration must be as to some fact or circumstance tending to connect the respondent with the crime. It is not sufficient that the evidence of the accomplice is corroborated by facts which tend to show the commission of the crime, and that the accomplice was concerned in it.

CRIMINAL LAW. Before Judge SCHLEY, *Chatham* Superior Court, November Special Term, 1873.

Jack Middleton and William Seabrook were placed on trial for the murder of John Houston. The evidence disclosed the following facts: The body of deceased was found in the Savannah river, with the appearance of having been in the water several days. There was a wound upon the head which was sufficient to produce death. It looked as if made by a crow-bar, or some other such instrument. The deceased was employed as a watchman on a lighter which lay off Fort Jackson. This boat contained wrecking material. Some of this was subsequently found in Dennis O'Connell's junk shop, in the city of Savannah. It was purchased by O'Connell from Scott Thurman and Zeke Jackson. The former gave his name as Scott Williams.

Here the state introduced Scott H. *alias* Thomas H. Thurman, who had been indicted with the defendants for the same offense, a *nolle prosequi* having been first entered as to him. The witness testified as follows: On the 26th of September, 1872, Jack Middleton proposed that I ride with him in his boat; I consented. He, William Seabrook, Zeke Jackson and myself met at Mrs. McGuire's on Farm street; Middleton proposed that we all go on a riding expedition; we went, and found abreast Fort Jackson two large lighters or barges. We heard some one talking to Houston; we made fast to the pillars of the Fort; after a while I proposed a return; I went to sleep, and was awoke about half past eleven at night by a steamer; I wanted to come back, but Middleton took me over to the lighter; after getting up, Houston said he did not like so many men on board that time of night; Middleton asked him about selling the iron; Houston refused to sell — went into his cabin and got an old sword and

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pistol; Middleton said, while Houston was gone, "shove him overboard and let him swim to shore;" I said, we had better tie him, if we do anything; it won't do to harm him. Middleton said, "you are fixing for him to halloo, now;" Seabrook said, "that aint worth a d—n." Jackson knocked Houston down as he was passing, with a crow-bar; witness tried to keep Jackson from throwing Houston overboard; Seabrook seemed also to be trying to stop it. Houston rose after being thrown in by Jackson, and swam to the boat; Jackson and Middleton loosened his hold and drowned him. Then Middleton and Jackson took the iron and passed it to Seabrook, who stored it away. Middleton cursed and abused me because I would not help; from fear I kept silent; we came up and landed at the canal dock; Middleton ordered all hands to meet there at five o'clock that morning; at eight I went down to the bluff, and saw them unloading a wagon; was present when the iron was sold; Mr. O'Connell paid Zeke Jackson \$18.10; Jackson then divided the money with the party; he kept \$6.00, Middleton took \$5.00, Seabrook \$3.50, and I was given \$3.60. Seabrook fastened the boat; Middleton said he wanted no cowards; that if he could not buy the iron, he'd have it anyhow. Went up the country to Effingham to work; after the arrest of Jackson and Middleton, I went to South Carolina; proposed to Seabrook to come to Savannah; he swore he would not. Mr. Morgan and Mr. Strobhar arrested me; told Mr. Morgan all about it when arrested, without any inducement offered. Seabrook broke and ran, but stopped and came back; he was with me at the time of the arrest. No bargain was between us, so far as I know, when we went down the river; did not know Houston; did not know what the party was about until they had remained at the Fort; went to sleep, and woke up at half past eleven at night; we left the city about five p. m.; don't know what they were talking about from the time they left the city; did not go to sleep until after we got to the Fort; when I wanted to go back, Jackson told me I was a child; it was after this that I went to sleep; I did not row back; up to the time that Jackson struck, nothing was said about killing, except what Middleton said about throwing him overboard. When Seabrook had hold of Houston, I asked him if he was pulling him away; he said, no, by G—d, he was choking him to keep him from hallooming; I made no effort to save Houston; saw it was no use;

we got back to the city about half past two in the morning; made a confession to the magistrate; nothing was offered me to confess.

Benjamin D. Morgan said: He had heard all that witness, Thurman, had said on the stand; it agreed with what he told him in South Carolina, almost word for word; Thurman's confession was voluntary; I told him if he would make the statements to me before a jury, he would be severely punished, but that his neck would be saved.

William Seabrook, in his statement, denied any connection with the murder; said it was Scott Thurman who tried to get him to come to Savannah from South Carolina, and swear against Middleton and Jackson.

Jack Middleton said he knew nothing about the matter, except what Thurman told him.

Thurman (recalled) said: Never had an opportunity of talking to Middleton; didn't say a reward was offered him with which to employ counsel.

The jury found the defendants guilty. A motion was made for a new trial, because the verdict was not authorized by the testimony. The motion was overruled, and defendants excepted.

*J. V. Ryals, G. W. Owens and S. B. Adams*, for plaintiffs in error.

*Albert R. Lamar*, Solicitor General, by *R. H. Clark*, for the state.

McCAY, J. There is in this record absolutely no evidence corroborating the accomplice, Thurman, in the sense of the law. We decided, in the case of *Childers v. State*, 52 Ga., 106, that the corroborating circumstances must be such as connect the prisoners in some way with the crime. We have, in that case, fully given our reasons for thus holding, and we will not repeat them. The conviction in the case at bar is based solely on the testimony of Thurman. There are circumstances going to show he is guilty, other than what he states, but absolutely none that the prisoners are. It is plain that he and Jackson sold the iron at the junk shop, and, identified as that iron was next day by the owner of it, he knew, before any confession was made, that there was evidence against him. It was small virtue for him to tell the tale he does after that. What circumstances there are in the

record, other than the confession, is in favor of the state. When the iron was sold to the prisoners, it was sold to the state. The men in the shop, the witness and the state, too, is, that the state is selling.

We only reason, it is, that the state can make such a case. There are no circumstances that connect the state with the witness. The state has no corroborating evidence of the crime, but the state is selling.

It is strange that the state is selling the same story in practice.

When the case is convicted, the state is selling the story for the state.

WALLACE testified in the case whether he had. Subsequently, the general rule in the proof was grounds "admissible."



record, other than those detailed by the accomplice, rather go in favor of the prisoners. The junk man, as well as his employee, Monroe, both testify that neither of the prisoners was present when the iron was sold, and that Thurman and Jackson brought it to the shop. It is not at all a reasonable story that the head men in the murder and robbery should trust the plunder to the witness and to Jackson. The fair inference from his statement, too, is, that he meant to testify that all were present at the selling.

We only mention these circumstances to show that in common reason, it ought to take pretty strong circumstances to corroborate such an accomplice; whereas, in the sense of the law, there are no circumstances of corroboration — nothing that in any way connects the prisoners with the crime but the statements of the witness. That he told the same tale when arrested is not only no corroboration by any matter connecting the prisoners with the crime, but it is illegal testimony any way.

It is strange to bolster up a witness by proof that he has told the same story before. We know of no authority for such a practice.

*Judgment reversed.*

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PEOPLE vs. AMANCUS.

(50 Cal., 233.)

EVIDENCE: *Impeachment of witness.*

When the character of a witness has been attacked by evidence that he has been convicted of felony, it may be sustained by evidence of his general reputation for truth and integrity.

WALLACE, C. J. Sachell, a witness for the prosecution, having testified in chief, was asked by the counsel for the defendant whether he had been convicted of felony, and answered that he had. Subsequently, the prosecution called a witness to prove that the general reputation of Sachell for truth, honesty and integrity in the community in which he resided was good. This proof was objected to by the counsel for the prisoner, on the grounds "that the same was irrelevant, incompetent and inadmissible; that no evidence had been offered by the prisoner



tending to impeach the said witness, Sachell, for truth, honesty and integrity."

The objection was overruled, and the proof admitted. An exception reserved by the prisoner to the ruling in this respect presents the only question to be considered upon this appeal.

The Code of Civil Procedure (sec. 2051) is as follows: "A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony." It is apparent that when the prisoners proved that Sachell had been convicted of felony, it amounted to an impeachment or an attempted impeachment of the witness, under the provision of the code just referred to. It was a direct assault upon his reputation for truth, honesty and integrity, made in the manner pointed out by the code concerning the impeachment of witnesses. The prosecution, therefore, has the right to sustain its witness by evidence of his good character, under the provisions of section 2053 of the same code, which provides in substance that the testimony of a witness may be supported by evidence of his good character, where such character has been impeached. The argument for the prisoner made here, asserts that "the proof of the previous conviction of the witness is in no sense an attack upon his general character for truth, honesty and integrity. The conviction is simply the consequence of one act of misconduct, and one particular act is not sufficient to make a general character. The law recognizes this, when it does not allow particular acts of misconduct on the part of witnesses to be shown by way of impeachment." (Code of Civ. Proc., sec. 2051.) If the proof of his previous conviction of a felony did not amount to an attack upon the general character of the witness for truth, honesty and integrity, what, it may be inquired, was the purpose of its introduction? Certainly it was not to exclude the witness on the ground of incompetency to testify by reason of infamy; for, under any rule, it came too late for that purpose, and not in the proper form.

But had it been offered at the earliest opportunity, and by the production of the record of conviction, it would not have availed

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to exclude the witness, because section 1879 of the same code provides, that a previous conviction of felony shall not operate to disqualify a witness, or preclude him from testifying in the case. It is apparent that the purpose of the proof that the witness had been convicted of a felony was (under section 1879) to repel the presumption that he spoke the truth, "by evidence affecting his character for truth, honesty and integrity," which in itself amounts to impeachment, for there is no force in the reference made to the general rule which forbids the impeachment of a witness by evidence of particular wrongful acts, because the Code of Civil Procedure (sec. 2051) already cited, while referring to the general rule, expressly permits proof of a conviction of felony as an exception to that rule.

*Judgment affirmed.*

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KEAN vs. COMMONWEALTH.

(10 Bush, Ky., 190.)

**EVIDENCE:** *Evidence of deceased witness on former trial — Reputation of family of witness.*

The evidence of a deceased witness, given on the first trial of the respondent, is admissible against him on a second trial of the same indictment.

But the statement in a bill of exceptions of the testimony of a deceased witness, given on a former trial, is not admissible against the respondent on a second trial of the same indictment. The testimony of the deceased witness must be proved by persons who were present at the first trial. The respondent has a right to be confronted with the witnesses against him.

In impeaching the character of a witness, evidence of the bad repute of his family or associates is irrelevant and inadmissible.

PRYOR, J. The appellant, *Henry Kean*, was indicted in the Jefferson circuit court, charged with murdering one Avery. He has been twice tried and found guilty as charged, and the case is in this court the second time for revision. A witness by the name of Maddox, who testified in the first trial, died before the second trial took place. His evidence was embodied in a bill of exceptions prepared in the court below, and considered in this court on the first appeal. On the second trial of the case, the one now being considered, the statements purporting to have been made by Maddox, as contained in the bill of evidence, were

permitted, against the objections of the accused, to be read as evidence to the jury. It is now urged by appellant's counsel that the admission of this testimony was in violation of the twelfth section of the bill of rights, which provides that in all criminal prosecutions, the accused hath the right to meet the witnesses face to face.

The conviction of the accused, in both instances, was upon circumstantial testimony alone, and the learned judge selected to try the case in the court below, in overruling the motion for a new trial, delivered an able though not convincing argument in favor of the competency of the testimony admitted.

Many authorities are referred to in behalf of the state, sustaining the right of the commonwealth to prove, by other witnesses, the statements of a deceased witness made under oath, in the same case and upon the same issue between the same parties. In this case, Maddox had been once examined as a witness, and the whole current of authority is, that in such a case those who were present and heard the statements of the deceased witness may testify as to what these statements were, if the witnesses so called are able to give the substance of all that was said by the dead witness, when the latter testified. The requirement that the accused shall have the right to meet the witnesses face to face is thus complied with, and no constitutional right violated.

The question in this case is not whether the statements of a deceased witness on a former trial were competent, for this must be conceded, but has the accused been deprived of a constitutional right in permitting a written statement of what the deceased witness said to go to the jury? We think he has, and that a witness or witnesses should have been called to prove these statements without reference to what was contained in the bill of exceptions. The evidence in a bill of exceptions may be read (when the witness is dead) in a civil action where a retrial has been ordered, but we have found no case where such testimony has been allowed in a criminal prosecution. The testimony of what a deceased witness stated is competent in either a civil action or criminal prosecution, but the mode of proving it is different. In a civil case, either mode may be adopted, but in a criminal prosecution, the statements must be proved by living witnesses who speak from their own recollection of what the deceased witness said. These witnesses are before the accused and

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the jury. The accused has the right to cross-examine, and to know, or ascertain from the witness, that he is detailing in substance all that was spoken by the deceased witness; without this, he is deprived of any oral examination, or of even knowing who is to testify against him. It is the presence of the witness that this provision of the bill of rights entitles the accused to have. The competency of the testimony when offered is with the court, but the right of the accused to see or confront the witness is an indispensable requirement.

In this case, the evidence of the deceased witness was reduced to writing by one of the counsel for the accused, from the notes of the testimony taken by the judge presiding at the first trial. It is shown by this attorney that these notes were inaccurate. The judge is not called on to testify, or the right to cross-examine allowed, in order that the accused may know how much of the testimony was omitted, or whether the attorney had embodied in the bill of evidence the substance of all the witness stated.

In this case, others seem to have been charged with the commission of the crime in connection with the accused. His associations with these parties as to time, place, etc., as well as many other circumstances, are necessary to be shown by the commonwealth in order to make an unbroken chain of testimony against the accused. A fact or circumstance proven on the first trial, and then regarded as immaterial by the court and counsel, might become of vast importance to the accused on the second trial, and therefore the necessity of having the witness before the jury in order that the accused may cross-examine.

Section 365 of the code provides "that in making an exception, only so much of the evidence shall be given as is necessary to explain it, and no more." This court has no power to reverse a judgment of conviction in a criminal case for the reason that the evidence does not authorize it. If there is any proof conducing to show the prisoner's guilt, the judgment must be sustained in this court, unless there has been some error of law to the prejudice of the accused, committed during the progress of the trial, and for which this court, by the provisions of the code, has the power to reverse. The court below, therefore, in making out a bill of evidence in a criminal case, only gives so much of it as will enable this court to determine the questions of law arising on the facts, and would necessarily omit many circumstances or

facts that were or might be of importance to the accused before a jury, and of but little consequence in this court.

The evidence in the case was taken down on the last trial, and adds nearly one thousand pages to the record, and it might well happen that the substance of all that was said by this witness was not contained in the bill of evidence. It is a constant occurrence for counsel to disagree as to what a witness has sworn to, both recollecting with equal clearness, and the court determining the issue between them, more with the view of having the legal questions arising, presented properly to this court than to get the substance of all the witness said. Even those who are present and favorably inclined to one party are very apt to make the language used by the witness conform to their own wishes, and hence the absolute necessity of giving to the accused, where his life or liberty is involved in the issue, the right of cross-examination. This right of the accused to confront the witness testifying against him is declared in both the federal and state constitutions, and doubtless in the constitution of every state in the union; a right indispensable to the citizen when his life or liberty is involved, and the admission of this silent witness is, in our opinion, in plain violation of the twelfth section of the bill of rights. (5 Ohio, 354; 10 Humph., 486; *Walston v. The Commonwealth*, 16 B. Mon., 15.)

It is maintained by counsel for the state that the evidence, conceding it to be incompetent, did not prejudice the rights of the accused. The persistency of counsel for the state in the court below in having it before the jury, as well as the importance attached to the question by the judge presiding at the trial, is sufficient evidence of its importance, without analyzing the testimony to show it. It is also insisted that, as the admission of incompetent testimony was not made a ground for a new trial in the court below, this court has no jurisdiction over the question. This question has heretofore been decided in the case of *Johnson v. The Commonwealth*, 9 Bush, 224.

The instructions given contain, in substance, the law of the case. Instruction No. 4 is rather an argument upon the effect of a confession than an instruction to the jury; as an abstract proposition of law it cannot be questioned, but in its application to the facts of a case, we doubt whether a jury should be told that a confession voluntarily made was among the most effectual proofs

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NOTE.—In the criminal case of *State, 22 Am. Cr. Rep.*, what a witness of evidence, since the witness, since on a subsequent and who swore the jury.

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in the case. The confession had been permitted to go to the jury, and they should have been left to consider it in connection with the other testimony in the case. The caution given juries in receiving proof of verbal confession has always been held proper, by reason of the humane and merciful considerations to which the accused is always entitled when on trial upon an issue involving his liberty or life.

No reversal would have been had, however, by reason of this instruction, as we are well satisfied the substantial rights of the accused were not affected by it. The other objections made to the rulings of the court are not available, even if such rulings were erroneous, as they are questions over which this court has no revisory power.

It is proper to suggest that in impeaching the character of a witness, by showing that he is not entitled to credit on oath, proof that his family or associates are in bad repute is clearly incompetent. It is the general character of the witness assailed that is in issue, and not that of his family.

We have examined this large record carefully, and refrain from expressing, as we have no right to do so, an opinion as to the guilt or innocence of Henry Kean; but whatever his condition in life may be, or the circumstances surrounding him, he is entitled to a fair and impartial trial and the maintenance of his constitutional rights.

The judgment of the court below is reversed, and cause remanded, with directions to award to the appellant a new trial, and for further proceedings consistent with this opinion.

NOTE.—The testimony of a deceased witness, examined on a former trial on a criminal charge, may be proved on a second trial for the same offense. *Pope v. State*, 22 Ark., 372. The prosecution, on a second trial for a crime, may prove what a witness, since deceased, testified to on a former trial. The general rules of evidence are the same in both criminal and civil cases. The testimony of a witness, since deceased, given on a former trial in a criminal case, may be proved on a subsequent trial, by permitting a person who kept notes of such testimony, and who swears they contain the substance of the testimony, to read his notes to the jury. *People v. Murphy*, 45 Cal., 137.

What a deceased witness testified on a former trial in a criminal case may be proved by a witness who was present and heard the deceased witness testify. The witness giving evidence of what the deceased witness testified to on a former trial must, however, give his evidence from his own recollection. If the witness who heard the deceased witness testify on a former trial be the attorney of the accused in both trials, the state, nevertheless, has the right to have his testimony on this

point, his recollection of all the important facts testified to by the deceased witness in favor of his client being presumed. *State v. Cook*, 23 La. An., 347.

Testimony proving the statements made by a deceased witness on oath, at a former trial, between the same parties, being one of the *established exceptions* to the rule that *hearsay is incompetent* as evidence, the admission of a witness to give evidence of this kind, in a criminal case, does not contravene the constitution.

It is not essential to the competency of such evidence, that it be given in the exact words used by the deceased person; but while the witness is allowed to give the *substance* of the statements of the deceased person in the former trial, he is not allowed the latitude of giving their mere *effect*.

It is essential to the competency of the witness called to give this kind of evidence, first, that he heard the deceased person testify on a former trial; and, second, that he has such accurate recollection of the matter stated, that he will, on his oath, *assume or undertake* to narrate, in substance, the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove.

It is essential to the competency of the evidence, first, that the matter stated at the former trial by the witness, since deceased, should have been given on oath; second, between the same parties, and touching the same subject matter; where opportunity for cross-examination was given the person against whom it is now offered; and, third, *that the matter sworn to by the person since deceased be stated in all its material parts, and in the order in which it was given, so far as necessary to a correct understanding of it.* *Summons v. State*, 5 Ohio St., 325.

On the second trial of the accused upon an indictment for assault with intent to murder one H., the state was permitted to show that H. had died since the previous trial, and then to prove by a witness the testimony given by H. as a state's witness upon the previous trial. *Held*, that although there are many authorities against the competency of such evidence in criminal cases, yet the great preponderance of judicial decisions, in both England and America, now concurs with the better reasoning in holding that such evidence is competent and admissible as well in criminal as in civil cases. *And held further*, that it is not necessary to prove the precise language used by the deceased witness in his testimony; the substance of his entire testimony is sufficient, and may be stated in different language than that employed by him. *Greenwood v. State*, 35 Tex., 587.

Proof of what a deceased witness testified to on a preliminary examination before a justice of the peace, touching the same charge for which the accused stands indicted, is admissible against him, although the examination was not reduced to writing. In such a case, it is not necessary to prove the language used by the witness in giving his testimony; its substance is all that is required. But proof of what a deceased witness testified to on a former trial is not admissible, unless the point in issue is the same. *Davis v. State*, 17 Ala., 354. The rule in regard to the proof of the testimony given in a former trial, by a witness who has since died, is the same in civil and criminal cases. So, upon the trial of a party on a charge of manslaughter, it was held competent for the prosecution to prove by persons who heard and remembered it, the testimony of a witness in the preliminary examination before a justice of the peace, such witness having died before the final trial. *Barnett v. People*, 54 Ill., 325.

A person was arrested and taken before the proper officer, charged with robbing the mail. At the preliminary examination, a witness, since deceased,

testified in cross-examination a jury, and the testimony was criminal evidence to prove substance of inquiry.

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testified in relation to the offense. The accused was present, and his counsel cross-examined the witness. Witnesses were permitted to prove, on a trial before a jury, under an indictment found for the same offense, what the deceased witness testified at the preliminary examination. The rules of evidence in civil and criminal cases, in this particular, are the same. It is sufficient, in such case, to prove substantially all that the deceased witness testified upon the particular subject of inquiry. *United States v. Macomb*, 5 McLean, C. C. (U. S.), 286.

A deposition of a witness, taken before the preliminary examination before a committing magistrate in the presence of the accused, may be received in evidence on the trial upon proof of the death of such witness (RYLAND, J., dissenting). The provision of the constitution of this state declaring "that in all criminal prosecutions the accused has the right to meet the witnesses against him face to face" does not render such evidence illegal. (RYLAND, J., dissenting.) *State v. McO'Brien*, 24 Mo., 402.

Rushing, who was examined as a witness against Kendrick, before a committing court, died before the trial of Kendrick in the circuit court. The attorney for the state proposed to prove on the trial what Rushing had stated before the committing court. This evidence was held not in violation of the constitutional right of the defendant to meet witnesses against him, face to face, for Kendrick had met Rushing face to face before the committing court, and had the right to cross-examine him, and had in the circuit court the right to cross-examine those who proved what Rushing had stated. Where it is proposed to introduce the testimony of a deceased witness given on a former trial between the same parties, it is not necessary to prove the exact words of such deceased witness. It is sufficient if the substance of all he said on the examination and cross-examination in relation to the subject matter in controversy be proved. *Kendrick v. State*, 10 Humph., 479.

On the examination before a justice of the peace of a prisoner charged with murder, the testimony of a witness for the commonwealth was taken in writing. The witness having died, the notes of his testimony were admissible on the trial. *Broen v. Commonwealth*, 73 Penn. St., 321.

The 12th article of the Declaration of Rights, which provides, that in criminal cases, the accused shall have the right "to meet the witnesses against him, face to face," is not violated by the admission of testimony in a criminal trial before a jury, to prove what a deceased witness testified at the preliminary examination of the accused before a justice of the peace.

It is not sufficient, in such case, to prove the substance and effect merely of the testimony of the deceased witness, although the memory of the witness offered to prove such testimony, be aided by notes taken at the preliminary examination; but the whole of the testimony of the deceased witness upon the point in question, and the precise words used by him, must be proved. *Commonwealth v. Richards*, 18 Pick., 434. If a hearing be had before a magistrate, upon the complaint of a town grand juror charging a person with the commission of a crime, and the respondent be, by the magistrate, bound over for trial by the county court, and an indictment be found against him, and before a trial is had upon the indictment, a witness, who testified before the magistrate, dies, evidence may be received on trial upon the indictment, to prove what that witness testified before the magistrate. And it is not necessary, on such trial, to prove the exact language used by the witness in giving his testimony before the magistrate; it is sufficient, if the



substance of his testimony, as there given, be detailed. *State v. Hooker*, 17 Vt., 658. But the rule seems to be otherwise in Tennessee and Virginia, where it is held that the evidence of a deceased witness cannot be given by the prosecution in a criminal case. See *State v. Atkins*, 1 Overt. (Tenn.), 229, and *Finn v. Com.*, 5 Rand. (Va.), 701.

### SHIVERS VS. STATE.

(53 Ga., 149.)

#### EVIDENCE: *Practice—Continuance.*

Under a statute which provides that the certificate of any public officer of the state to any record, document, paper on file, or other matter or thing in his office, shall be admissible in evidence in any court of the state: *Held*, that such certificate is admissible against a defendant in a criminal case, and that his constitutional right to be confronted with the witnesses against him is not thereby violated.

The defendant applied for a continuance when the case was called for trial, on the ground that the indictment was only found two days previously, and his counsel had been so much engaged that he had not been able to prepare the case for trial. It being made to appear by the certificate of the trial judge, that the defendant had been arrested the term before, and was then fully informed of the charge against him, and was asked if he desired counsel, and wanted a trial, to both of which questions he answered no: *Held*, there was no error in overruling the motion for a continuance.

SHIVERS was indicted for the offense of embezzling \$11,000, collected by him as tax collector for the county of Hancock, during the year 1871. He pleaded not guilty.

When the case was called for trial, he moved for a continuance on the ground that the indictment had been found only two days previous thereto, and his counsel had been constantly engaged in the business of the court to the exclusion of any opportunity of making preparation in the case, or even of consulting with his client. The motion was overruled and defendant excepted.

It was shown by the prosecution that the defendant was the tax collector of Hancock county; that the state tax assessed for the year 1871, on the taxable property of said county, was \$11,000; that the defendant had collected various amounts from divers tax payers during that year; that when the solicitor general, as agent for the comptroller general and treasurer of the state, demanded the \$11,000 from him, he replied that he had collected and used the money, and did not then have a dollar, but that "if they would give him a chance, he would make it and pay it."

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The solicitor general tendered in evidence the following papers:

"HANCOCK COUNTY—S. C. SHIVERS, <i>Tax Collector</i> .		
"To general and poll tax, 1871.....	\$12,076	77
"1873. January 8th, by general tax paid treasurer.....	284	05
"1873. January 8th, by poll tax paid treasurer .....	513	00

"OFFICE OF THE COMPTROLLER GENERAL

"OF THE STATE OF GEORGIA.

"ATLANTA, GA., *January 24, 1874.*

"I, W. L. Goldsmith, comptroller general of the state of Georgia, do hereby certify that the above and foregoing account of S. C. Shivers, tax collector of the county of Hancock, in said state, for the year 1871, is a full, true and complete exemplification taken from the books on file in this office, and there required to be kept by law, in which the accounts with said state, of all the tax collectors thereof, are kept according to law; that said account is truly and correctly taken and copied from said books; that the same is a full, true and complete exemplification of all the accounts of said S. C. Shivers with said state, as such tax collector, from the year 1871 up to the present date, as copied and taken from said books; that the balance of \$11,279.72 due thereon is unpaid, and that the amounts credited thereon January 8th, 1873, were paid by L. L. Lamar, tax collector of said county.

"Given under my hand, official signature and seal of office, 24th day of January, 1874.

(Signed) "W. L. GOLDSMITH, *Comptroller General*."

Also certificate from the treasurer, in similar form to transcript from his books, covering all payments into the treasury during the month of December, 1871, from whatever source, among which none appeared as having been made by the defendant.

This evidence was objected to, but was admitted by the court, and defendant excepted.

The jury found the defendant guilty. A motion was made for a new trial upon each of the above grounds of exception. The motion was overruled, and defendant excepted.

As to the refusal of the continuance, the presiding judge certified as follows:

"When this case was called, it was postponed for a day to give defendant's counsel time. The defendant was arrested the

term before and brought before me under a warrant. When asked by the court if he wanted counsel, he said 'no.' If he wanted a trial, he said 'no.' He was fully informed then of the nature of the accusation, as much as he was after the bill was found."

*George F. Pierce, M. W. Lewis and F. L. Little*, for plaintiff in error.

*Samuel Lumpkin*, Solicitor General, for the state.

WARNER, C. J. The defendant was indicted for the offense of embezzlement, and on the trial thereof was found guilty by the jury. A motion was made for a new trial, on the several grounds alleged therein, which was overruled by the court, and the defendant excepted. Two grounds of error only have been insisted on here: First, the refusal of the court to grant the defendant a continuance on the showing made therefor; and second, in admitting in evidence the certified copies of the record books of the state treasurer and comptroller general, the defendant insisting that he was entitled to be confronted with the witnesses testifying against him, and that, in allowing the certified copies of the records kept by those officers to be read in evidence, the defendant was deprived of a constitutional right. By the law of this state, the certificate of any public officer thereof, of any record, document, paper on file, or other matter or thing in their respective offices, or appertaining thereto, is admissible in evidence in any court of this state. Code, sec. 3816.

The mistake of the plaintiff in error in this case consists in the assumption that the certificates of the treasurer and comptroller general as to what appears in the records of their respective offices is the personal testimony of those officers; whereas, they only certify what appears on the records of their office. They were not personally examined as witnesses against the defendant. If they had been offered as witnesses against the defendant at the trial, they would necessarily have been required to testify in open court; their testimony could not have been taken by interrogatories. From the explanatory note of the presiding judge, and in view of the facts contained in the showing for a continuance, the defendant had reasonable time and opportunity to have prepared his defense.

As a general rule, the court before which the case is tried will

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be allowed a liberal discretion as to the continuance of cases, and this court will not interfere with it, unless it has been manifestly abused, and injustice done.

Let the judgment of the court below be affirmed.

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STATE vs. STANLEY.

(64 Me., 157.)

FALSE PRETENSES.

On an indictment for false pretenses, in the sale of a horse, a pretense that the horse was sound, when the respondent knew that he was not, is a false pretense within the statute.

APPLETON, C. J. This is an indictment for cheating one Sullivan by means of certain false pretenses.

The allegations in the indictment are, that the defendant, in an exchange of horses with one Sullivan, knowingly, designedly and falsely pretended that his (the respondent's) horse was a sound horse, when, in fact, it was not; that said Sullivan believed said false pretense, and was thereby deceived, and induced to exchange and deliver his horse to the respondent, and was thus defrauded.

The question is, whether or not the indictment sets forth a false pretense within Rev. Stat., ch. 126, § 1.

The assertion of the soundness of his horse by the defendant is the assertion of a material fact. It is false. It was made to deceive and defraud. It accomplished its purpose. This much the demurrer admits. It is not readily perceived why this falsehood is not within the spirit, as well as the letter, of the statute.

In *State v. Mills*, 17, Me., 211, the owner of a horse represented to another that his horse, which he offered in exchange for the property of the other, was a horse known as "the Charley," when he knew that it was not the horse called by that name, and by such representation obtained the property of the other person in exchange, it was held that the indictment was sustained, although the horse said to be "the Charley" was equal in value to the property received in exchange, and as good as "the Charley." So the statement that the property is unin-

cumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretenses, notwithstanding there may have been a warranty, if the false pretense, and not the warranty, was the inducement which operated upon the party to make the exchange. *State v. Dorr*, 33 Me., 498. In *The People v. Crissie*, 4 Denio, 525, an indictment that the defendants falsely pretended to a third person that a drove of sheep, which they offered to sell him, were free of disease and foot-ail, and that a certain lameness, apparent in some of them, was owing to an accidental injury, by means of which they obtained a certain sum of money on the sale of said sheep to such person, with proper qualifying words, and an averment negating the facts represented, was held good under the statute against cheating by false pretenses. In *Rex v. Jackson*, 3 Camp., 370, it was held to be an offense to obtain goods by giving a check on a banker with whom the drawer kept no cash. So the representation that a bank check was a good and genuine check, and would be paid on presentation, when the drawer had no funds in the bank on which it is drawn, is a false pretense. *Smith v. People*, 47 N. Y., 303. So false representations as to quality may constitute a false pretense, for which the person so falsely representing may be indicted. *Reg. v. Sherwood*, 40 Eng. Com. Law, 585. So by giving false samples. *Reg. v. Abbott*, Den. C. C., 379. In *Reg. v. Kenrick*, 48 Eng. Com. Law, 49, the false pretense was that the horses were the property of a private person, and not of a horse dealer and that they were quiet and tractable, and Lord DENMAN, C. J., says; "The pretenses were false, and the money was obtained by their means," and the indictment was sustained. In that case the purchaser wanted a quiet and tractable horse; in the one at bar a sound one was wanted. In that case, as in the one at bar, the false representation was effective to defraud.

A false pretense may relate to quality, quantity, nature or other incident of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded. *Reg. v. Abbott*, 61 Eng. Com. Law, 629. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact, with knowledge of its falsity. *Bishop v. Small*, 63 Me., 12; *Rex v. Reed*, 32 Eng. Com. Law, 904. No harm can happen to any one from abstinence in the making of false representations. When made, and material

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#### FALSE PRETENSES

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and effective for deception, no sufficient reason is perceived why the guilty party should escape punishment.

Exceptions overruled.

*Indictment adjudged good.*

DICKERSON, DANFORTH, VIRGIN, PETERS and LIBBEY, JJ., concurred.

### KELLER vs. STATE.

(51 Ind., 111.)

**FALSE PRETENSES: Indictment—Criminal pleading—Contradictory allegations.**

An indictment for false pretenses in selling a mortgage which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, without alleging that such name and description are unknown, is bad on a motion to quash as being too uncertain and indefinite.

In an indictment for false pretenses in the sale of a \$500 mortgage, where the pretense was that the real estate covered by the mortgage was worth \$3,500, an allegation that the real estate was not worth \$3,500 is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of \$500.

It seems that, in a prosecution for false pretenses in the sale of a mortgage, if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the respondent represented the real estate to be very much more valuable than it actually was.

In an indictment for false pretenses in the sale of a mortgage, where the pretense is that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient.

The averments in criminal pleadings should be definite, clear and distinct.

Representations of future events are not false pretenses, which must be as to existing facts.

An indictment containing contradictory and repugnant allegations is bad.

BESKIRK, J. The appellant was indicted in the court below for obtaining property by false pretenses. The indictment contains two counts, which, as to the false pretenses charged, are nearly identical. The appellant moved to quash each count, but this motion was overruled, and he excepted. He pleaded not guilty, and was tried by a jury and was found guilty. The court

overruled the motions in arrest of judgment and for a new trial, to which exceptions were taken. Judgment was rendered on the verdict.

The appellant has assigned for error, the overruling of his motions to quash the indictment, in arrest of judgment, and for a new trial.

The first question for the consideration of the court relates to the sufficiency of the indictment.

The first count, omitting the formal parts, is as follows: "The grand jurors of Tipton county, in the state of Indiana, good and lawful men, duly and legally impaneled, sworn and charged in the Tipton circuit court of said state, at the spring term for the year 1875, to inquire into felonies and certain misdemeanors in and for the body of the said county of Tipton, in the name and by the authority of the state of Indiana, on their oath do present that one Robert H. Keller, late of said county, on the 13th day of October, in the year 1874, at and in the county of Tipton, and state of Indiana, did then and there unlawfully, feloniously, designedly and with intent to defraud one George W. Boyer, falsely pretend to the said George W. Boyer, that he, the said Robert H. Keller, had been the owner, and had recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground, situated in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum, to wit, the sum of thirty-five hundred dollars; that said real estate was of great value, and fully worth the said sum of thirty-five hundred dollars, and that there was still due the said Robert H. Keller, upon the purchase money of said house and lot of ground so sold as aforesaid, the sum of five hundred dollars, and that there was no lien or incumbrance on said house or lot of ground except the said lien of five hundred dollars, for the purchase money thereof, due the said Robert H. Keller, as aforesaid, and that if the said George W. Boyer would sell and deliver to the said Robert H. Keller, goods, chattels and property to the amount of five hundred dollars, he, the said Robert H. Keller, would pay the said George W. Boyer therefor, in and with a promissory note given and being for the said sum of five hundred dollars, the purchase money due the said Robert H. Keller, upon the said house and lot of ground as aforesaid, and to be made payable to the said George W. Boyer, on the 1st day of March, in the year 1875, and secured

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by a mortgage upon the said house and lot of ground, and that the said lien of five hundred dollars, for the purchase money for the said house and lot of ground, and the said mortgage securing the same, was all and the only lien whatever upon the said house and lot of ground, and that the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient surety for the payment of the said purchase money as aforesaid, and that the note executed as aforesaid to the said George W. Boyer would be of the full value of and worth the sum of five hundred dollars.

By means of which said false pretenses then and there made to the said George W. Boyer, by the said Robert H. Keller, as aforesaid, he, the said Robert H. Keller, did then and there, with intent to cheat and defraud him, the said George W. Boyer, unlawfully and feloniously obtain and receive from the said George W. Boyer, the following goods, chattels and property, to wit: one spring wagon, of the value of two hundred and twenty-five dollars; one two horse wagon, of the value of one hundred and fifty dollars; one log wagon of the value of one hundred and twenty-five dollars; all of the said goods, chattels and property, being of the aggregate value of five hundred dollars; and for the goods, chattels and property of the said George W. Boyer, and in payment for the said goods, chattels and property so obtained and received by the said Robert H. Keller, from the said George W. Boyer, as aforesaid, he, the said George W. Boyer, did receive the said five hundred dollar note, fully relying upon and believing said false and fraudulent pretense and representations made to him by the said Robert H. Keller, as aforesaid, and believing them to be true; whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, in the county of Marion, in the state of Indiana, for a large sum, to wit: for the sum of thirty-five hundred dollars, as aforesaid; and that said house and lot of ground were not then of the value or worth thirty-five hundred dollars as aforesaid; and that the said lien and mortgage of five hundred dollars on the said house and lot of ground for the purchase money thereof as aforesaid, was not the only lien and incumbrance then upon said house and lot of ground, but there were various and numerous other liens

thereon, older and prior to the said lien of five hundred dollars, amounting in the aggregate to two thousand dollars, and greatly exceeding the value of said house and lot of ground; and that said house and lot of ground were not then of sufficient value to amply and sufficiently secure the payment of the said five hundred dollar note, as aforesaid; and that said note, executed to the said George W. Boyer, as aforesaid, was not worth or of the value of five hundred dollars, but was in fact entirely worthless, and of no value whatever, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

We proceed to the examination of the first error assigned. The first count in the indictment has been set out, and as it is quite lengthy, we will summarize its averments and negations.

1. It is averred that Robert H. Keller (falsely pretended that he) had been the owner, and had recently sold to a certain party, whose name is not given, nor is it averred that this name was unknown to the jurors, a certain piece of real estate, to wit: a house and lot of ground situate in the city of Indianapolis, county of Marion, and state of Indiana, for a large sum of money, to wit: for the sum of thirty five hundred dollars. There is no further description of such real estate or any averment that it was unknown to the jurors.

2. That said real estate was of the value of thirty-five hundred dollars.

3. That there was still due the said Robert H. Keller, upon the purchase money of said house and lot the sum of five hundred dollars.

4. That there were no liens or incumbrances upon the said house and lot except said sum of five hundred dollars for the unpaid purchase money, and the mortgage securing the same.

5. That the said house and lot of ground were of the full value of thirty-five hundred dollars, and ample and sufficient security for the said sum of five hundred dollars.

6. That the note which was executed by the purchaser of said real estate to George W. Boyer, to whom said representations were made, and in reliance upon which he had sold to said Keller certain personal property, would be of full value, and worth the said sum of five hundred dollars.

The first averment is very vague and indefinite. There is no

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sufficient description of the real estate alleged to have been owned and sold by the appellant. Nor is the name of the purchaser given. Criminal charges must be preferred with reasonable certainty, so that the court and jury may know what they are to try, of what they are to acquit or convict the defendant, and so that the defendant may know what he is to answer, and that the record may show, as far as may be, of what he has been put in jeopardy. The averments should be so clear and distinct that there could be no difficulty in determining what evidence was admissible under them. It fully appears from the evidence in the record that the appellant had owned and transferred lot No. 46, in Yandes' subdivision of outlot No. 129, in the city of Indianapolis, county of Marion, and state of Indiana. This evidence was admitted over the objection and exception of appellant. Its admission was objected to on the ground that the averments of the indictment were neither specific nor broad enough to render such evidence admissible. If the appellant, in his representations to Boyer, did not describe the property which he had owned and sold, the description of the property could not have been introduced in that portion of the indictment; but the first averment as above set out might have been preceded or followed by a statement that the appellant had owned and recently sold lot 46 in Yandes' subdivision of outlot No. 129, in the city, county and state aforesaid, and that the representations relied upon were made in reference to such property. If the name of the purchaser of such lot was known to the grand jury, it should have been stated, but if unknown, that fact should have been averred.

The negation to the first averment is as follows:

"Whereas, in truth and in fact, the said Robert H. Keller had not then recently sold to a certain party a certain piece of real estate, to wit, a house and lot of ground situate in the city of Indianapolis, in the county of Marion, and state of Indiana, for a large sum of money, to wit, for the sum of thirty-five hundred dollars as aforesaid, and that said house and lot of ground were not then of the value of, or worth thirty-five hundred dollars."

By the above averment and negation, the guilt of the appellant is made to depend upon the question whether the house and lot of ground had been sold to a certain party for the exact sum of thirty-five hundred dollars, and whether they were worth that

exact sum, when it should have been made to depend upon whether the appellant had sold said house and lot of ground to any person for said sum, and whether the property was of such value as to amply secure said sum of five hundred dollars alleged to be due.

The second averment is, that appellant represented that said real estate was of the value of thirty-five hundred dollars. It is contended by counsel for appellant that a statement of the value of property is a mere expression of opinion or judgment, about which men may honestly differ, and if there is no fixed market value, an estimate that is too high will not constitute a criminal false pretense.

The question discussed by counsel does not squarely arise upon the averment in the indictment, and hence we do not consider or decide the question, preferring to await until it arises on the evidence or instruction of the court based upon the evidence.

There is no negation of the third averment, hence, it is admitted to be true, and no evidence would be admissible to prove it to be untrue.

The fourth averment and its negation are insufficient. The negation to the fourth averment does not set out or describe the liens that constituted the prior incumbrances. How was it possible for the appellant to prepare for trial under such an averment and negation? How could he show, on trial, that the liens proved by the state had no valid existence, or had been paid off? He would have no notice of the liens relied upon until the evidence was offered by the state. It would be contrary to well established principles to allow evidence to be given upon a material issue, tending to fasten fraud and falsehood upon the party, without any averment or notice in the indictment of the fact sought to be proved. *The People v. Miller*, 2 Parker C. C., 197.

The fifth averment and its negation are sufficient.

The sixth relates to a future event, and cannot constitute a criminal false pretense. Bishop, in sec. 420 of his *Crim. Law*, vol. 2, p. 230, says:

"And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense, within the statute, for the pretense must relate either to the past or to the

present."

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present." See *Jones v. The State*, 50 Ind., 473, and authorities there cited.

Although some of the averments are sufficient, yet, standing alone and disconnected with the other averments, they are not sufficient to constitute a good indictment.

There is a direct repugnancy in the averments of the indictment, which renders it fatally defective. It is alleged, "that if the said *George W. Boyer* would sell and deliver to the said *Robert H. Keller*, goods, chattels and property to the amount of five hundred dollars, he, the said *Robert H. Keller*, would pay the said *George W. Boyer* therefor, in a promissory note, given and being for the said sum of five hundred dollars, the purchase money due the said *Robert H. Keller* upon the said house and lot of ground, as aforesaid, and to be made payable to the said *George W. Boyer* on the 1st day of March, in the year 1875, and secured by mortgage upon said house and lot of ground," etc.

It is alleged that *Keller* was to pay *Boyer* in a note given and being for the said purchase money, and it is then averred that said note is to be made payable to the said *Boyer*, and secured by a mortgage upon said real estate. In *The State v. Locke*, 35 Ind., 419, the indictment was held bad because it charged that the pretense was made to induce Kiser to become the security of Locke, on a six hundred dollar note, but that, instead of going security, he became a principal, and made a note for six hundred dollars, payable to Locke. The indictment was held ambiguous and uncertain, and an indictment must be direct and certain, as it regards the party and the offense charged. *Whitney v. The State*, 10 Ind., 404; *Walker v. The State*, 23 id., 61; Bicknell's *Crim. Prac.*, 90, 93, 94; *The State v. Locke*, *supra*; *The Commonwealth v. Magowan*, 1 Met. (Ky.), 368; *The People v. Gates*, 13 Wend., 311.

It is a settled rule of criminal pleading, that the offense charged must be proved in substance as charged. This cannot be done in the averment under examination. The two averments are directly repugnant. Both cannot be true. The facts of the case are not correctly stated. It is averred that the note for five hundred dollars had been given to *Keller*, and was secured by mortgage. It was shown upon the trial that, at the time the representations were made, *Keller* had agreed upon a sale of his house and lot of ground, in the city of Indianapolis,

but the deed had not been made, nor had the notes and mortgages been given, and that these facts were known to *Boyer*, and it was then agreed that a note for five hundred dollars should be made payable directly to *Boyer*, and secured by mortgage; and it also appears that this was done. Such proof could not sustain the averments of the indictment.

We are very clearly of the opinion that the indictment cannot be sustained. It is ambiguous, uncertain, repugnant, and defective in its averments and negations.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the motion to quash. The clerk will give the proper order for the return of the prisoner.

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#### JONES vs. STATE.

(50 Ind., 473.)

**FALSE PRETENSES:** *Indictment—False token—Property obtained.*

A printed business card, such as ordinarily used by business men, purporting to be the card of a manufacturing firm in C., which is not a genuine business card of such firm, but fraudulent, is a false token.

An indictment for false pretenses, which does not allege that the prosecutor relied on the false pretenses as true, is bad on a motion to quash.

An indictment for false pretenses which does not set out the contract into which the prosecutor was induced to enter by means of the false pretenses, is bad on a motion to quash, because it does not show why or how the prosecutor was induced by means of the false pretenses to part with his property.

The indictment in this case is held to allege facts sufficient to deceive a person of ordinary caution and prudence.

Where a note was obtained by false pretenses, and a few hours afterwards the respondent induced the prosecutor to exchange that note for a second of the same tenor, because the first was written in pale ink, it was held that the evidence was sufficient to sustain the allegation in the indictment which charged the obtaining of the second note by means of the false pretenses, it being all one transaction.

**BUSKIRK, J.** The appellant was indicted for, and convicted in the court below of, obtaining the signature of Jephtha O. Mayfield, to a note payable to appellant by false pretenses.

A motion to quash the indictment was overruled, and an exception taken.

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A plea in abatement was filed, to which a demurrer was sustained, and an exception taken.

A motion for a new trial was overruled, and an exception taken.

A motion in arrest of judgment was overruled, and an exception taken.

The errors assigned are as follows:

1. That the court erred in overruling the motion to quash the indictment.

2. That the court erred in sustaining the demurrer to the plea in abatement.

3. That the court erred in overruling the motion for a new trial.

4. That the court erred in overruling the motion in arrest of judgment.

We will dispose of these assignments of error in the order stated. Did the court err in overruling the motion to quash the indictment? That portion of the indictment material to this question is as follows:

"That Edwin E. Jones, on the 14th day of January, 1875, at said county of Jefferson, feloniously, designedly, and with intent to defraud one Jephtha O. Mayfield, did falsely and feloniously pretend to the said Jephtha O. Mayfield that he, the said Edwin E. Jones, was the agent of a firm of persons in the city of Cincinnati, state of Ohio, doing business under the firm name of 'Mills, Spillmeyer & Co., at Nos. 368, 370 and 372 West Third street, in said city of Cincinnati;' that said firm were largely engaged in the manufacture of a certain implement called 'Herman's Improved Lifting Jack,' and that he, the said Edwin E. Jones, had authority from said firm to sell said lifting jacks for the said firms, and to contract for and in behalf of said firm for the sale of said lifting jacks by said Jephtha O. Mayfield, and did then and there feloniously, designedly, and with intent to defraud said Jephtha O. Mayfield, exhibit to said Jephtha O. Mayfield a certain printed card of said firm of Mills, Spillmeyer & Co., and which said card was and is in the words and figures following: 'Mills, Spillmeyer & Co., manufacturers of Herman's Improved Lifting Jack, Nos. 368, 370 and 372 West Third street, Cincinnati, Ohio. Send orders for Herman's Lifting Jack, in accordance with contract;' and did falsely, feloniously, de-



signedly, and with intent to defraud said Jephtha O. Mayfield, pretend to said Jephtha O. Mayfield, that said card was the genuine card of said firm of Mills, Spillmeyer & Co., aforesaid; that said Jephtha O. Mayfield relied on said pretenses so made to him by said Edwin E. Jones, and by means of said false pretenses the said Edwin E. Jones did then and there feloniously, falsely, designedly, and with intent to defraud said Jephtha O. Mayfield, obtain from said Jephtha O. Mayfield, a note of the said Jephtha O. Mayfield for the sum of four hundred dollars, which note is of the tenor following:

"MADISON P. O., JEFFERSON COUNTY,

"\$400.

January 14, 1875.

"Six months after date I promise to pay to the order of E. E. Jones, at the First National Bank, Indianapolis, Indiana, four hundred dollars, with interest at the rate of — per annum from date, value received, without any relief whatever from valuation or appraisal laws. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note. If this note is not paid at maturity, the undersigned agrees to pay the expenses of collection, including attorney's fees.

J. O. MAYFIELD.

"With intent then and there to cheat and defraud him, the said Jephtha O. Mayfield; whereas, in truth and in fact, the said firm of Mills, Spillmeyer & Co., were not engaged in the manufacture of the implement called 'Herman's Improved Lifting Jack,' and whereas, in truth and in fact, said Edwin E. Jones was not then and there the agent of said firm of Mills, Spillmeyer & Co., and did not then and there have any authority from said firm to sell said lifting jacks for said firm, and to contract for the sale of the same by said Jephtha O. Mayfield, for said firm, and whereas, in truth and in fact, the said card, so exhibited as aforesaid and hereinbefore set forth, was not then and there the genuine card of said firm of Mills, Spillmeyer & Co., contrary to the form of the statute," etc.

Section 27, 2 G. & H. 445, reads as follows: "If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of

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value, such person shall, upon conviction thereof, be imprisoned," etc.

The *gravamen* of the crime consists in obtaining the signatures of any person to any written instrument, or in obtaining from any person any money, transfer, note, bond or receipt, or thing of value.

The offense may be committed by two means: first, by color of any false token or writing; second, by any false pretense. The word "token," in its ordinary signification, means "a sign," "a mark," "a symbol." The words "writing" and "written" include printing, lithographing, or other mode of representing words and letters. Sec. 1, subdivision nine, 2 G. & H., 338.

The indictment in the present case attempts to charge that the signature of *Mayfield* was obtained to the note by means of a false token, and by pretending that he was the lawful agent of *Mills, Spillmeyer & Co.*, and had authority for and in behalf of said firm for the sale of said lifting jack.

The first question is, whether the printed card set out in the indictment comes within the meaning of the words "token or writing," used in the statute.

Bouvier's Law Dictionary defines the legal meaning of the word "token" thus: "Token. A document or sign of the existence of a fact. Tokens are either public or general, or privy tokens. They are either true or false. When a token is false, and indicates a general intent to defraud, and is used for that purpose, it will render the offender guilty of the crime of cheating, 12 Johns., N. Y., 292; but if it is a mere privy token, as counterfeiting a letter in another man's name, in order to cheat but one individual, it would not be indictable. 9 Wend., N. Y., 182; 1 Dall., Penn., 47; 2 Const. So. C., 139; 2 Va. Cas., 65; 4 Hawks, N. C., 448; 6 Mass., 72; 12 Johns., N. Y., 293; 2 Dev., N. C., 199; 1 Rich., So. C., 244."

We think the token exhibited by the appellant was a general token, and indicated a general intent to defraud, and when accompanied by the false pretenses alleged in the indictment, was calculated to deceive a person of ordinary intelligence and prudence.

It is very earnestly contended by counsel for appellant that the false pretenses set out in the indictment are not sufficient to constitute the crime attempted to be charged. The first objec-

tion urged to this part of the indictment is, that the word "pretended" is used instead of the word "represented." In our opinion, the objection is untenable. The word "pretense" is used in the statute defining the crime. The word "pretend" is the verb of the noun "pretense." The form of indictment given by Bicknell in his Criminal Practice, p. 341, uses the word "pretense." See Whart. Crim. Law, sec. 2144.

It is next urged that the indictment fails to aver any false pretense which was sufficient to induce a person of ordinary caution and prudence to execute his note for a large sum of money, and we are referred to the following adjudged cases: *The State v. Magee*, 11 Ind., 154; *Johnson v. The State*, 11 id., 481; *The State v. Orvis*, 13 id., 569.

In the first case cited, it was said: "The pretenses must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property, and to which a person of ordinary caution would give credit. A pretense, therefore, that a party would do an act he did not intend to do is not within the statute, because it is a mere promise for his future conduct. *Roscoe Crim. Ev.*, 465, *et seq.*; 11 Wend., 557; 14 id., 547; 3 Hill, 169; 4 id., 9, 126; 19 Pick., 186. These authorities plainly show that any representation or assurance, in relation to a future event, may be a promise, a covenant, or a warranty, but cannot amount to a statutory false pretense."

In the second case cited, the indictment was held to be bad, because it was not averred that the checks were delivered to the prosecuting witness, and were by him received in payment for the harness. The case has but little, if any, application to the present case.

The case of *The State v. Orvis*, *supra*, is in several respects much like the present case. In that case, the indictment was held to be bad, for the reason that it did not appear therefrom that there was any contract or agreement between the defendant and Smith, for the purchase by Smith of an agency to sell the articles mentioned, or that Smith parted with his money for the purchase of an agency to sell, or any other interest in the articles named. In other words, that no connection was shown between the pretenses alleged and the obtaining of the money. In that case, the indictment, after setting forth the false pretenses and negativing the averments, concluded as follows:

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"By color and means of which said false pretense and pretenses, he, the said Charles B. Orvis, then and there, on," etc., "did unlawfully, feloniously, designedly and falsely obtain from said John F. Smith, forty dollars, then and there being the property of said John F. Smith, contrary," etc.

That portion of the indictment in the case in judgment is as follows:

"And by means of said false pretenses, the said *Edwin E. Jones* did then and there feloniously, falsely, designedly, and with intent to defraud said *Jephtha O. Mayfield*, obtain from said *Jephtha O. Mayfield*, a note of the said *Jephtha O. Mayfield*, for the sum of four hundred dollars, which note is of the tenor following," etc.

There is no averment that the said Mayfield was induced, by means of said false token and pretense, to purchase of said Jones the right to sell said lifting jack, and that in consideration of said purchase, he executed the note set out in the indictment. In other words, there is no connection shown between the false pretenses alleged and the obtaining of said note. It is not shown why or upon what consideration or for what purpose the note was executed. Suppose Jones did exhibit the card of the said firm as genuine, when it was false and forged, and suppose he did pretend that he was the lawful agent of said firm, and had authority to make contracts in the name and on behalf of said firm for the sale of said lifting jack, when, in truth and in fact, he was not such agent and had no authority to contract in the name and on behalf of said firm. The facts assumed to exist wholly fail to show any consideration for the note, or any reason why it was executed. The necessary connection between the false pretenses and the execution of the note would have been shown by an averment that the said Mayfield, by color and means of said false pretenses and in reliance upon the same as true, had been induced to purchase from the said Jones, as such agent, the right to sell said machine, for the sum of four hundred dollars, and in consideration thereof, had executed the said note.

It is also claimed by counsel for appellant that the note set out in the indictment is not the one that was obtained by the false pretenses alleged. The facts are these: After Jones had obtained one note from Mayfield, he went back to his house, and

upon the ground that such note and contract were written in pale ink, induced Mayfield to surrender up the contract. Thereupon a new note and contract were drawn and executed. They were the same as those surrendered, except written in different and better ink. The execution of the first note was obtained by means of the false pretenses alleged, and the second, by means of the first note. The point is not entitled to much consideration. There was no consideration for the second note, except that which supported the first. It was, in substance, one transaction, and the fact that the note set out in the indictment was executed a few hours after the first cannot change its legal character.

We think the pretenses alleged in the indictment were sufficient to deceive a person of ordinary caution and prudence. It is true, that many persons would not have been deceived thereby. They might, by reason of their long experience and greater shrewdness, have detected the fraud, or, having their suspicions excited, they would have communicated to the firm in Cincinnati. But laws are not made for the protection of the shrewd and business man only, but for the entire community. In the enactment of criminal laws, the legislature adopts, as a standard of intelligence, neither the highest nor the lowest, but the medium. The law only requires the exercise of ordinary caution and prudence. Business could not be transacted without placing confidence in the representations of persons engaged therein. While the law does not encourage blind confidence, it does not expect those engaged in the ordinary affairs of life to possess the shrewdness and cunning of the practiced detective. The question therefore is, in such a case as the present, what would a man of ordinary intelligence and caution have done under the facts and circumstances surrounding this transaction? Would such a man have believed and acted upon such pretenses? If he would, the case is made out.

For the failure to allege that Mayfield relied upon such pretenses as true, and upon the faith thereof, purchased from Jones the right to sell such "lifting jack," and in consideration thereof, executed the note set out in the indictment, we must hold the indictment bad.

The judgment is reversed, and the cause remanded, with directions to the court below to sustain the motion to quash the

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indictment. The clerk will give the proper order for the return of the prisoner to the jail of Jefferson county.

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MARANDA vs. STATE.

(44 Tex., 442.)

An indictment for false pretenses which does not allege that the respondent "knowingly" made the false pretenses is bad on a motion in arrest of judgment.

MOORE, A. J. The motion in arrest of judgment should have been sustained. Knowledge of the false pretense by means of which money or property is fraudulently obtained is an essential constituent of the offense with which appellants are charged. Without proof that they knew that the pretense was false, evidently they should not be convicted. And although the word "knowingly" is not one of the statutory words used in defining the offense, still as the offense, as defined by the statute, clearly requires that it shall be proved, we think, by the rules of correct pleading, it should be averred in the indictment. And so it is held by courts of the highest authority and standard commentators. (*Regina v. Philpotts*, 1 Car. & Kir., 112; 2 Bish. Cr. Proc., sec. 172.) The necessity for such an averment in the indictment has been clearly recognized by this court in the opinion of Mr. Justice Devine in the case of *State v. Levi* (41 Tex., 563). The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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WATERMAN vs. PEOPLE.

(67 Ill., 91.)

FORGERY: *Letter of introduction.*

A letter of introduction directed "to any railroad superintendent," bespeaking courtesies toward the bearer, has no legal validity and affects no legal rights, and is not a subject of forgery.

BREESE J. This was an indictment in the criminal court of Cook county, against plaintiff in error and one William E. Dundee, for forgery.

VOL. I.—15

The writing alleged to have been forged was as follows:

THE DELAWARE & HUDSON CANAL COMPANY,  
H. A. FONDA, *Albany and Susquehanna Department,*  
*Superintendent.* ALBANY, N. Y., *August 23, 1873.*

*To any railroad superintendent:* The bearer, T. H. Wiley, has been employed on the A. & S. R. R. as brakeman and freight hand. Any courtesies shown him will be duly appreciated, and reciprocated, should opportunity offer.

Very resp'y and truly yours,

H. A. FONDA, *Supt.*

The indictment framed upon this writing contains not a single averment of any extrinsic matter which could give the instrument forged any force or effect beyond what appears on its face. No connection is averred between the party to whom the writing is addressed and the Chicago, Rock Island & Pacific Railroad Company. Nor is it averred that the prisoner attempted to pass the writing upon that company.

The writing, if genuine, has no legal validity, as it affects no legal rights. It is a mere attempt to receive courtesies on a promise, of no legal obligation, to reciprocate them.

We are satisfied that the writing in question is not a subject of forgery, and no indictment can be sustained on it, and no averments can aid it.

It is a mere letter of introduction which, by no possibility, could subject the supposed writer to any pecuniary loss or legal liability. As well remarked by the prisoner's counsel, courtesies are not the subject of legal fraud.

The motion in arrest of judgment should have been allowed. To refuse it was error.

As no prosecution can be founded on the writing, the judgment must be reversed, and the prisoner discharged from custody.

*Judgment reversed.*

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## WILLIAMS vs. STATE.

(51 Ga., 535.)

FORGERY: *Imperfect instrument — Indictment.*

An indictment charging respondent with forging a bank check payable to the order of —, is bad on demurrer. A check not payable to bearer, or to the order of a named person, is so imperfect that it could not defraud anyone.

An indictment for forgery, which does not allege who was intended to be defrauded by the forged instrument, is bad on demurrer.

THE defendant was indicted for the offense of forgery. In the indictment he was charged with falsely and fraudulently making and signing a certain false, fraudulent and forged bank check, in the words, letters and figures, printed and written as follows, to wit:

"No. 76.

SAVANNAH, GA., May 24th, 1873.

"Central Railroad and Banking Co., pay to the order of — three hundred and sixty dollars.

(Signed)

"J. LAMAR."

The defendant was also, in one of the counts of the indictment, charged with having falsely and fraudulently uttered and published as true the forged and counterfeited check above described, knowing the same to be counterfeited and forged, with intent to defraud, but it is not alleged whom he intended to defraud. On arraignment, the defendant demurred, in writing, to the sufficiency of the indictment, which demurrer was overruled, and the defendant excepted. The case then proceeded to trial, and the jury found the defendant guilty on the second count in the indictment.

The exceptions to the charge of the court, and refusal to charge as requested, are substantially embraced in the exception to the overruling of the demurrer, and will be considered together.

1. The demurrer to the indictment was on the ground that the bank check alleged to have been forged was incomplete, and could not have defrauded anyone. The check was not payable to bearer, or to the order of any named person, and therefore was incomplete as a bank check, and could not have defrauded the bank or the drawer of the check.

2. In the case of the *People v. Galloway*, 17 Wend., 540, the

cases bearing upon this question were reviewed, and the principle to be deduced from them is, that if the instrument alleged to have been forged is so imperfect and incomplete that no one can be defrauded by it, then the defendant cannot be convicted of that offense.

3. Besides, it is not alleged in this indictment that the defendant intended to defraud any person by the making, signing, uttering or publishing of the instrument described in the indictment.

The indictment alleges that it was done by the defendant with intent to defraud, but whom he intended to defraud is not alleged. The court erred in overruling the demurrer to the indictment.

Let the judgment of the court below be reversed.

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BROWN *vs.* PEOPLE.

(66 Ill., 344.)

FORGERY: *Variance — Tenor.*

An indictment for forging a note purported to set forth the note according to its tenor. The signature to the note, as stated in the indictment, was, <sup>his</sup> Otha  $\times$  Carr. The note offered in evidence was signed Otha  $\times$  Carr. <sup>his</sup> <sub>mark.</sub> Held, a fatal variance, and the note inadmissible.

The word "tenor" binds the pleader to the strictest accuracy.

Where the record does not show whether inadmissible evidence which was objected to was admitted or not, but the court can see from the record that if such evidence was not admitted, there is nothing to sustain the verdict, the judgment and verdict will be set aside. If the objectionable evidence was admitted, that is error. If it was not, the verdict is erroneous because there is nothing to support it. In either case there is error.

WALKER, J. This was an indictment for forgery, found by the grand jury of Warren county against plaintiff in error and one Robinson.

Plaintiff in error was arrested, arraigned, and tried by the court and a jury, found guilty and sentenced to confinement in the penitentiary at hard labor for one year. To reverse that judgment, the record is brought to this court on error, and various grounds are urged for reversal.

On the trial, the prosecution offered in evidence the instru-

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ment alleged to have been forged, when accused objected on the ground of a variance between the indictment and the instrument offered.

The indictment contained two counts, in the first of which it is averred that accused "unlawfully and feloniously did falsely, fraudulently make and forge a certain promissory note for the payment of money, and the signature and mark of one Otha Carr to said promissory note, purporting to be made and executed by said Otha Carr. The tenor of which promissory note is as follows, to wit:

"\$150.00.

BERWICK, Ill., Aug. 29, 1870.

"Six months after date, for value received, I promise to pay J. B. Drake, or order, one hundred and fifty dollars, with interest at 10 per cent. per annum till paid.

"Witness by H. N. Brown.

O<sup>his</sup>THA X CARR."  
mark.

The second count avers the uttering of a promissory note, knowing it to be false, fraudulent, forged and counterfeit, "the tenor of which counterfeited promissory note is as follows, to wit: Then follows the copy of a note in all respects similar to that set out in the first count of the indictment.

The note offered in evidence purports to have been signed "Oatha X Carr." The difference in the manner of spelling the signature as described in the indictment, and of that to the instrument offered in evidence, is the variance relied on by defendant below. In Wharton's Am. Cr. Law, vol. 2, sec. 1471, 6th ed., it is said, an omission of a part of the date is fatal under such an averment. It is further said, "but where the indictment charges the note to be in purport and effect following, it was held that 'I promise' was an immaterial variance from 'I promised.' It would seem, however, that the distinction taken in the last case between the averments 'words and figures following,' and 'tenor and effect,' if such was actually intended, is not in conformity with precedents. The word 'tenor' binds the pleader to the strictest accuracy." And for this last proposition, reference is made to *Rex v. Powell*, 2 East's Pleas to the Crown, 976. Again, the same author says, in sec. 1476, "An indictment for forgery of an instrument, professing to set it out according to its tenor, should give the names, in describing the instrument, spelled as they appear spelled in the original." And this rule

appears to be supported by authority, and we recognize it as being correct. The name is differently spelled in the indictment and the note offered in this case, and is manifestly false within the rule thus announced.

We have thus far considered the case as though the note was read in evidence, although the record only states that the people's attorney offered the note in evidence, to which defendant's attorney objected, on the ground of variance between the note described in the indictment and the note offered. Although the record fails to show that the note was read to the jury, still the question of variance would perhaps arise in another trial, and hence we have chosen to decide the question.

But if the note was not read in evidence, then the evidence wholly fails to support the verdict. In such a case there is nothing to support the finding. In either case, however, the judgment must be reversed. If it was read in evidence, it was error, because of the variance, and if it was not read, then there is error, as the verdict and judgment have no basis on which to rest.

The judgment of the court below is reversed, and the cause remanded.

*Judgment reversed.*

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MILLER vs. STATE.

(51 Ind., 405.)

FORGERY: *Evidence — Election.*

On the trial of an indictment containing two counts, one of which alleges the forging of a draft and the other the uttering and publishing of the forged draft as true, it is not error for the court to refuse to require the prosecutor to elect on which count he will proceed to trial. This is a matter in the discretion of the trial court.

The uttering and publishing of a forged instrument by the respondent raises no presumption of law that he committed the forgery.

On a charge of forgery the uttering and publishing of the forged instrument are circumstances to be weighed by the jury in connection with other evidence in the case.

WORDEN, J. The appellant was indicted for forgery; the indictment containing two counts. The first charged him with having forged the name of Calvin Mullen upon the back of a draft drawn by the First National Bank of Xenia, Ohio, upon the First National Bank of Cincinnati, Ohio, for the sum of

eight hundred dollars.  
Mullen.

The second count charged him with publishing as true a draft, purporting to be drawn by the First National Bank of Xenia, Ohio, in the name of Calvin Mullen.

The defendant's motion for a new trial was overruled.

The defendant's motion for a new trial was overruled. The court said that the evidence was sufficient to support the verdict, and that the defendant had no right to a new trial.

On the second count, the defendant was found guilty of publishing as true a draft, purporting to be drawn by the First National Bank of Xenia, Ohio, in the name of Calvin Mullen.

Several questions were raised by the defendant's motion for a new trial, and the court answered them as follows:

"If it is shown that the defendant forged the draft, it is not error for the court to refuse to require the prosecutor to elect on which count he will proceed to trial. This is a matter in the discretion of the trial court."

The court said that the evidence was sufficient to support the verdict, and that the defendant had no right to a new trial. The court also said that the defendant's motion for a new trial was overruled.

The court said that the evidence was sufficient to support the verdict, and that the defendant had no right to a new trial.

Now, if the payee cannot be identified, the draft is void. The court said that the evidence was sufficient to support the verdict, and that the defendant had no right to a new trial.

eight hundred dollars, payable to the order of said Calvin Mullen.

The second count charged him with having uttered and published as true a forged and counterfeited indorsement of said draft, purporting to be the indorsement upon the same of the name of said Calvin Mullen.

The defendant moved to quash each count, but the motion was overruled. Each count, it seems to us, was good.

The defendant moved to require the prosecutor to elect on which count he would put the defendant on trial, but the motion was overruled. Doubtless the court might, in its discretion, have required the election to have been made, but there was no error in refusing to do so. *Mershon v. The State*, 51 Ind., 14.

On the trial, there was a general verdict of guilty, and the defendant was sent to the state's prison for the term of eight years.

Several reasons were stated for a new trial, but we deem it necessary to notice one only. The court instructed the jury, amongst other things, as follows:

"If it is shown that the endorsement is forged, and that the defendant had in his possession and passed said check, with the forged indorsement thereon, the presumption arises that the defendant made the indorsement, and unless that presumption is explained and rebutted, it will be sufficient evidence to warrant you in coming to the conclusion that the defendant made such indorsement."

The charge thus given was radically wrong. The draft or bill of exchange, being indorsed by the payee in blank, would pass from hand to hand by delivery, without any further indorsement, so as to vest the title in each successive holder. The count charging the defendant with having uttered and published the forged indorsement as true, necessarily contained the allegation that the defendant knew the indorsement to have been forged at the time he uttered and published it as true. 2 G. & H., 446, sec. 30. The *scienter* is a necessary ingredient of the offense charged in the second count, and the allegation must be supported by competent evidence.

Now, it might happen that a bill, thus apparently indorsed by the payee in blank, might pass through innocent hands, and it cannot be law that each person through whose hands such a bill might pass, the indorsement turning out to be forgery, is to be

presumed *prima facie*, to have made the forged indorsement. If the instruction be correct, then it follows that, while on a charge of uttering and publishing as true any such forged indorsement, a party could not be convicted without averment, and proof of the *scienter*, yet he might be convicted on a charge of the forgery of the indorsement without any other proof than the mere uttering and publishing as true of the forged indorsement.

We do not think it can be laid down as a rule of law that the uttering and publishing as true of a commercial instrument, with the name of the payee forged thereon, raises a presumption that the person uttering and publishing is guilty of forging the indorsement. On a charge of the forgery of the name, the uttering and publishing are circumstances to be considered by the jury, with any other evidence bearing on the question of the forgery, and what weight shall be given to the uttering and publishing is to be determined by the jury, in the same manner as they determine the weight of other evidence in criminal cases.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for a return of the prisoner.

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PORTER *vs.* STATE.

(51 Ga., 300.)

GAMING: *Things of value.*

Chips and checks redeemable in money by the dealer at a gambling table are things of value, within the meaning of a statute against gaming.

MCCAY, J. The statute makes gaming to consist of playing, etc., "for money or other thing of value." Why are not "checks," "chips," and things of this character, just as much things of value as bank notes? They are both of them only the representatives of value. If a check is good when presented to the banker or dealer for twenty-five cents or one dollar, according to its stipulated value, we are unable to see how it fails to come within the statute, any more than if the keeper of the bank had written his formal promise to pay, or the bet had been for as much money as the check or chip represents. In fact, that is

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the truth of the case. The bet is really for money, and the check is merely to aid in keeping the account as well as for convenience.

We suspect this case is only brought here for delay, and not really to test the legality of the conviction, and we are sorry we are not able to add to the penalty fixed by the judge, for this trifling with the public tribunals.

*Judgment affirmed.*

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STATE vs. HENDERSON.

(47 Ind., 127.)

GAMING: *Betting on election.*

Betting upon the result of an election is not gaming.

OSBORN, J. This case is brought here under section 119, 2 G. & H., 420. The point reserved was the ruling of the court upon the sufficiency of the second paragraph of the answer filed by the appellee.

The bill of exceptions shows that the appellee was indicted by the grand jury of Morgan county, for betting and wagering upon the result of the election of governor in 1872; that he appeared and filed an answer of two paragraphs. The second alleged "that before the indictment was by said grand jury found or presented, said grand jury caused the defendant to be duly subpoenaed before them, to testify as a witness to the facts and matters alleged in said indictment; and that he was by said grand jury then and there, before the finding or presenting of said indictment, compelled to testify, and did testify, as a witness in said cause, and then and there to disclose as such witness all the facts and matters alleged in said indictment, and to prove the said offense charged in the said indictment."

To this paragraph the state demurred, on the ground that it did not state facts sufficient to constitute an answer. The demurrer was overruled, and the state excepted, and reserved the point of law for the decision of this court. A replication in denial was then filed, and the cause was submitted to the court for trial, who found the appellee not guilty on the defense, as stated in the second paragraph of the answer.



The paragraph of the answer in question was predicated upon section 89, 2 G. & H., 410, which provides, that any person called as a witness to testify against another for gaming is a competent witness to prove the offense, although he may have been concerned as a party, and is compelled to testify as other witnesses, but he shall not be liable to indictment or punishment in any such case.

In our opinion, the answer is bad. To exempt a person from prosecution or punishment on the ground that he has been compelled to testify as a witness, under section 89, *supra*, it must appear that he was compelled to testify against another for gaming. This answer shows that the appellee was compelled to testify touching a wager on the result of an election, and not to prove the offense of gaming. Betting upon the result of an election is not gaming; an election is not a game. *Woodcock v. McQueen*, 11 Ind., 14; *McIlhatton v. Bates*, 4 Blackf., 63.

In our opinion, the decision of the court below overruling the demurrer to the second paragraph of the answer was erroneous.

As this court is not authorized to reverse a judgment of acquittal in a criminal prosecution, the judgment of the said Morgan circuit court is affirmed, at the costs of the appellee.

*Judgment affirmed.*

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#### STATE vs. BOOK.

(41 Iowa, 550.)

#### GAMING: *Playing billiards—Keeping gambling house.*

Under a statute which provides that to "play at any game for any sum of money or other property of value" is gambling, playing at billiards where the loser pays for the game is gambling.

The owner of a billiard table which is used with his knowledge and consent for playing billiards, on an understanding between the players that the loser shall pay for the game, is guilty of keeping a gambling house.

MILLER, C. J. The evidence shows that the defendant kept a place, as charged in the indictment, where persons resorted for the purpose of playing games of billiards, pin pool, etc., and where the defendant also kept cigars and drinks for sale; that it was the custom or habit of persons resorting to this place, to play billiards and pin pool, "and the losing party to pay for the

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game;" the price of pin pool was five cents a cue, and billiards twenty cents a game. Sometimes, too, the man that got beat would treat. The evidence also leaves no doubt of the fact that the defendant knew the games of billiards and pin pool were played in the manner the evidence shows; in other words, that it was usual, in fact universal, for them to play those games with the agreement or understanding that the loser should pay for the games, and that they were in fact so played.

I. The court, among other things, charged the jury that if they found the above enumerated facts, they would be authorized to find the defendant guilty under the indictment.

It is urged by counsel for appellant that these facts do not constitute the crimes charged in the indictment. In other words, that playing the game of "pin pool" with the agreement that the losing party shall pay for the game, and he did so in fact, is not gambling, and, therefore, to suffer such playing in a house or place under the control or care of the defendant, does not constitute the crime charged.

The statute provides that to "play at any game for any sum of money or other property of any value" is gambling. (Code, sec. 4028.) Now, it is clearly shown, and not disputed, that the defendant kept certain tables on which divers persons were in the habit of playing at what is called the game of "pin pool." That this play is a "*game*" there is no dispute, and there is no controversy about the fact that for the use of the tables and other instruments of the game, the defendant charged and required the player to pay a certain sum of money for each cue (whatever that is). When, therefore, two or more persons played this game, they became jointly or severally bound to pay the sum or sums of money chargeable therefor. It is plain that if they play the game or games in order to determine which of the players shall pay the entire sum or sums which they would be jointly or severally bound to pay, they play for the sum each one would be bound to pay, and it does not change the matter that they play the game in advance of paying therefor. The principle is the same as if the money had been staked or put up before the game was played. It is gambling in the one case as well as in the other. Nor is it any less gambling that the sum of money played for is small. To "play at *any* game for *any* sum of money," however small, comes within the statute.

This view is sustained by *The State v. Leighton*, 3 Foster (N. H.), 167; and *Ward v. The State of Ohio*, 17 Ohio St., 32, both cases being precisely in point. In the former, the learned judge delivering the opinion of the court says: "The defendants made a profit from the use of the billiard tables; for the 'hire' of them they were paid a shilling a game. The persons who resorted there played for the hire. In substance they played for a shilling a game. The loser paid and the winner received the sum. By an understanding among the players, the money was to be applied towards defraying the expenses of the tables; but still it was money won at play and upon the chances of play." The same doctrine is held also in the case last cited. In *Harbaugh v. The People, etc.*, 40 Ill., 294, and *Blewitt v. The State of Mississippi*, 34 Miss., 606, a contrary doctrine is held under the statute of those states. Under our statute, we deem the former the correct view, and that any different construction would not be warranted.

II. After the jury had been out for some time, they came into court and submitted to the court, in writing, the following question:

"Judge Reed: Will you state for our information if, in taking the surrounding circumstances, such as Book's presence while the games were being played, and receiving the money, we should conclude that he knew how the games were being played and played unlawfully, should we find him guilty in connection with this evidence? H. M. Cook, Foreman."

Which the court answered as follows:

"If you find, from the evidence, that parties who played on defendant's billiard tables, in his place of business, did so with the understanding that the loser should pay to defendant the amount charged all the members of the party for the use of the table, and that the defendant knew that they were playing under such arrangement, and permitted them so to play, you should find the defendant guilty."

The objection urged to this instruction is, that it directs the jury as to the force or effect of the evidence. We do not so understand it. It simply tells the jury that if, "from the evidence," they find certain *facts*, then they should find the defendant guilty. There was no error in the instruction in this respect, nor in any other, as we have already seen.

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The judgment of the district court will be affirmed.

NOTE. — *People v. Sargeant*, 8 Cow. (N. Y.), 139, is also an authority that playing at billiards, where the loser pays for the game, is not gambling.

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CONYERS vs. STATE.

(50 Ga., 103.)

*Permitting minor to play billiards without consent of guardian — Burden of proof.*

On the trial of an indictment for permitting a minor to play billiards without the consent of his parents or guardian, the burden of proof is on the state to show that the minor did not have the consent of his parents or guardian.

MCCAY, J. Whilst it is certainly true, as a general rule, that the burden of proof is upon the party who holds the affirmative of a proposition, yet there are many instances in which a contrary rule obtains. Our code, 1873, section 3758, declares that "if a negation or negative affirmation is essential to a party's case, the proof of such negative lies upon the party affirming it." The test is, Does the negative form an essential ingredient in the thing sought to be established? Does the mind fail to agree to the proposition insisted on, so long as the negation remains unproven? If so, the proposition is not made out, and the party asserting the negation must prove it.

In criminal cases, the law requires that the state shall prove all the essential facts entering into the description of a crime, and, except in a very few special cases, the defendant cannot be put upon his defense, until the state has shown affirmatively every such act. In *Elkins v. The State*, 13 Ga., 435, this court lays down the rule very broadly, and asserts that whatever is made by the statute an essential part of the offense, must be set out in the indictment and proven by the state. The want of consent by the parent or guardian is the very gist of this crime. It is not unlawful for men to play billiards. It is not unlawful even for minors to play, if their parents or guardians consent. The want of the consent is the very essence of the offense. There is a class of negations which it is almost impossible to prove affirmatively. Where the field to be covered by the evidence is so broad as that, the burden would be intolerable upon the public,

to afford the time necessary for hearing this proof, as where it is only possible to prove that one was not present, by examining a large number of persons who did not see him, or where the proof that one did not do a thing can only be established by proof following him from movement to movement, through a considerable time. But there are negations that are just as easily proven as an affirmative, as where the negation depends upon a moment of time and a particular place, or is within the knowledge of a single person. In the former class, even, the general rule that the prosecutor in criminal cases must prove all the ingredients of the crime, has, in some cases, been relaxed. As in prosecutions under the English game laws, where one may kill game if he has one of a large number of qualifications, it has been held that it was not necessary for the crown to go to expense and the public to suffer the inconvenience of proving the absence of each of the required qualifications, especially (and this is perhaps the true point on which the exception turns) if the facts lie peculiarly in the defendant's knowledge.

This was the holding of the court in *The King v. Turner*, 5 Mau. & Sel., 206, and it seems to have been followed in 1 Ry. & Moo., 159; 1 Car. & P., 508, and by several other English and many American cases, though it is certainly true that the old cases even on the game laws, are different. 2 Ld. Raym., 1415; 1 Stra., 497; 2 Com., 525; 1 T. R., 125; 1 East, 643; 1 id., 639, and the courts have not always kept in mind the distinction between cases where the negative is part of the description of the offense, and where it is by provision of a subsequent section or by a subsequent act; 3 Dev., 299; 3 B. Mon., 342; 34 Me., 293; 12 Barb., 26; N. H., 8. Our own court has made the exception in the case of an indictment for retailing spirituous liquors without license. In the case of *Sharp v. The State*, 17 Ga., 290, this court held that if the selling of spirituous liquors was proven, the *onus* was shifted to the defendant, and that it was not necessary for the state to prove the want of license.

This is a strong case, for the want of the license is a part of the description of the offense. We are free to say that we do not think the reasoning of the court in that case very sound, since it is said there that by his plea of "not guilty" the defendant admits the selling, and asserts that he has license—a line of reasoning which is, as it seems to us, untrue, since the

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plea of not guilty denies the whole charge. But the case may be sustained on another ground, and by authority. The license is a written authority to the dealer to sell, and the presumption is that he has it in his possession. It is peculiarly within his knowledge. The negative *cannot* be shown conclusively by the state. It could only be proven that no such license was recorded; but the defendant might have the license and be not guilty, though the license was not recorded. All the proof in the *power* of the state would be inconclusive, to wit: that no such license was issued. The license is in writing, and cannot be proven by parol, and it is in the defendant's possession, if it exists, and on this ground there are many cases making this special crime an exception to the general rule. See the cases, both English and American, above referred to in 1 Bennett's Criminal Cases, and notes, 306, 319; though there are many cases of high authority to the contrary; 24 Pick., 380, and the cases there cited. But undoubtedly the general rule is that in criminal cases the burden of showing all the facts necessary to make out the defendant's guilt is upon the state.

In rape, the proof must show that the act was against the will of the female. In robbery, that the taking was against the consent of the person robbed; in larceny from the person, that the taking was without the knowledge of the possessor in the case; opprobrious words, that they were *unprovoked*, and in the various acts of trespass against property, as cutting wood, etc., on another's land, that they were without the owner's consent. The books are full of illustrations of the position we have asserted, to wit: that if in order to make the defendant guilty, it be necessary to show a negative the burden of showing it is upon the state. *Harvey v. Towars*, 4 Eng. L. & E., 531; *May v. The State*, 4 Ala., as when the defendant was indicted for keeping a grey hound, not being a person qualified. 1 Str., 66. In the same volume is a case for profane swearing, under the act of 6 and 7 Will. III. The act put a penalty of one shilling upon a servant, and two shillings on every other person. The conviction was quashed because it was not proven that the defendant was not a servant. So in *Rex v. Allen*, 1 Moo. C. C., 154, and *Rex v. Rodgers*, 2 Camp., 634, in an indictment for killing deer on the ground of another without his consent, it was held that the prosecution must prove the want of consent. See, also,

2 Greenl., 228; 2 Car. & P., 45; 2 Jones (N. C.) 276; where the doctrine is discussed. See, also, 10 East, 211, where it was held that the burden was on the crown to show that the defendant had not taken the sacrament. In 5 Rich., 57, that a practicing physician had no license; that one was not qualified to vote: 9 Met., 286.

The case at bar, we think, comes within the general rule. The consent of the parent is not required by the statute to be in writing, and does not, therefore, as in the case of license to sell, lie peculiarly within the knowledge of the defendant. That the consent was not given is as well known to the parent or guardian as it is to the defendant. We are, for these reasons, of the opinion that the conviction was wrong, under the proof. There was no evidence of the want of consent, and this was a material ingredient in the offense charged.

*Judgment reversed.*

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ZOOK *vs.* STATE.

(47 Ind., 463.)

GAMING: *Indictment.*

Under a statute which prohibits the keeper of a billiard table from allowing a minor to play on it, and inflicts a fine for each game allowed to be played, an indictment which does not allege that a game was played, or name the person with whom the minor played, or give any reason for not naming him, is bad, on a motion to quash.

PETTIT, J. This was an indictment for allowing a minor to play billiards, in violation of the following section of the statute, Acts of 1873, p. 30:

"Sec. 1. That if any person owning, or having the care, management or control of any billiard table, bagatelle table or pigeon hole table, shall allow, suffer or permit any minor to play billiards, bagatelle or any other game at or upon such table or tables, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall, for each game so allowed, suffered or permitted to be played, be fined in any sum not less than five dollars, nor more than fifty dollars."

A motion to quash this indictment was overruled, and exceptions taken; and this ruling is assigned for error.

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The objections urged to the indictment are, that the person with whom the minor played billiards is not named, nor is any reason or excuse given for not naming him; and that the indictment does not show or charge a game was played.

This indictment is not specific and certain in contemplation of law, so as to enable the defendant to prepare for his defense, because it does not name the person with whom the minor played, and a conviction on this indictment would not be a bar to another indictment charging that the minor played with a person named.

The statute makes it penal to allow a minor to play a game. The indictment does not charge or show that the minor did or was allowed to play a game. We hold that the objections to the indictment are well taken. 2 G. & H., 410, 412; *Quinn v. The State*, 35 Ind., 485; *Whitney v. The State*, 10 id., 404; *The State v. McCormick*, 2 id., 305; *The State v. Noland*, 29 id., 212. Many other cases are cited, both in this and other states, to sustain the position taken, but we deem it unnecessary to refer to them.

The indictment is bad, for not alleging that a game was played, and in not naming the person with whom it was played, or giving a reason why he was not named.

The judgment is reversed, with instructions to sustain the motion to quash the indictment.

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### EX PARTE LE BUR.

(49 Cal., 159.)

#### HABEAS CORPUS.

##### *Federal prisoner in state prison.*

A person who has been convicted of a crime against the United States by a federal court, and confined in the prison of the state with the consent of the state, is deemed to be in the custody of the federal authorities.

##### *Release of federal prisoners by state courts.*

The courts or judges of the state have no authority to release a prisoner upon a *habeas corpus*, when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case.

APPLICATION to Mr. Chief Justice WALLACE to be discharged on *habeas corpus*, from imprisonment in the state prison of the state of California.

The return of Ramualdo Pacheco, warden of the state prison, shows that in the year 1868, the prisoner was convicted in the circuit court of the United States for the district of Oregon, of the crime of aiding or being accessory to, and of robbing the United States mails, and sentenced to be imprisoned, at hard labor, for the term of ten years; that the prisoner is detained by the said Pacheco, under and in pursuance of certified copies of the judgment and order of commitment, and of a certified copy of a message from the Hon. O. H. Browning, secretary of the interior, to the United States marshal for the district and state of Oregon, designating the state prison of California as the place of confinement, and ordering the marshal to remove the prisoner to the state prison at San Quentin. The judgment, after naming the term of confinement as above stated, concluded with this order:

"It appearing to the court that there is no law of the state of Oregon authorizing persons sentenced to be imprisoned by this court, to be confined in the penitentiary of the state, it is ordered that the sentence of imprisonment hereby imposed upon the defendant be executed by imprisoning him, for the term aforesaid, in the county jail of Multnomah county, in the state aforesaid, until further order."

The commitment recited the order in the judgment, and directed the marshal to deliver the prisoner "to the keeper of the county jail of said county of Multnomah, in the state aforesaid, there to be safely kept by him, the said keeper, in close confinement until he be discharged by due course of law, or until further order."

The telegraphic message from the secretary of the interior was as follows:

"WASHINGTON, *March 3, 1869.*

"Received at Portland March 3, 1869 — 9 A. M.

"To ALBERT ZIEBER, Marshal U. S.:

"Transport to California penitentiary \* \* William Le Bur, \* \* (Signed) O. H. BROWNING, *Secretary.*"

The copies of the judgment, order of commitment, and telegram, were certified by the clerk of the court.

*F. M. Pixley*, for petitioner:

The return does not show any authority for detaining the prisoner. The warden is the agent of the state, not of the United States, and it appears by the judgment and the order of commit-

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ment, that the prisoner was ordered to be confined in the county jail of Multnomah county, Oregon, "until further order." That means until further order of the court, for the power to designate the place of confinement is a judicial function, and the designation of the place is a necessary part of the sentence, as much so as the fixing of the term. The secretary of the interior, being an executive officer, has no power to change the place of imprisonment designated by the court. No order was ever made by the court removing the prisoner to this state, and, therefore, he is not lawfully detained here. But, if the secretary of the interior be held to have the power to change the place, there is no evidence that he has done so, for the telegram is not authenticated by the seal of the secretary's office, nor certified by any one having authority to attest its authenticity.

*Walter Van Dyke*, United States District Attorney, for respondents:

A state court cannot issue the writ of *habeas corpus*, where the party imprisoned is in custody under the authority of the United States. If he is wrongfully imprisoned, the federal tribunals alone can release him. *Ableman v. Booth and the United States*, 21 How., U. S., 506.

The prisoner is in the custody of the respondent under the authority of the United States. The telegram of the secretary of the interior is sufficient to authorize the imprisonment of the prisoner by the respondent. It is of necessity without a seal, for such a message cannot be transmitted with a seal. The secretary has authority to designate places of confining prisoners. 2 Bright. Dig. of U. S. Laws, p. 164, sec. 56; *id.* p. 182, sec. 55.

The power of designating the place is an executive function merely, not judicial. When the sentence is passed by the court, its power over the prisoner is exhausted, and all that remains is to execute the sentence. That must be done by executive officers. To hold that the place cannot be changed without an order of the court, would be to render executive officers powerless to act in cases of emergency, such as fires.

WALLACE, C. J. The prisoner is detained in custody by the authorities of the government of the United States, by virtue of the judgment rendered by the United States court in Oregon, and it is not claimed that the term of his imprisonment has ex-

pired. The circumstance that he is imprisoned at the state prison, and in the keeping of its warden, is of no import in this respect, for these are but the agencies and means of his confinement, adopted by the United States by the consent of the state.

The petitioner being a prisoner held by the authorities of the government of the United States, by virtue of the judgment of a federal court of exclusive jurisdiction in the case, it is my duty under the statutes of the state to remand him. Penal Code, sec. 1486.

It is there provided that if the time during which a party may be legally detained in custody has not expired, he must be remanded if he appear to be detained in custody "by virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction."

In *Ableman v. Booth*, 21 How., U. S., 523, the question of the power of the state courts to deal with persons detained as the petitioner is, was discussed by Mr. Chief Justice Taney with his accustomed ability, and it was there held that when the return to the writ is made, and the state court or judge is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. "They then know," says the chief justice, "that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under the authority can pass over the line of division between the two sovereignties. He is then within the domain and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

The petitioner must be remanded, and it is so ordered.

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#### WRIGHT vs. PEOPLE.

(33 Mich., 300.)

ASSAULT WITH INTENT TO MURDER: *Written verdict construed—Practice.*

In a prosecution for assault with intent to murder, the jury brought in the following written verdict: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information;

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also, that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The judge, after reading the verdict aloud, said, "you find the prisoner guilty as charged in the information," to which the jury nodded assent; and the verdict so given was recorded as a general verdict of guilty, and the jury discharged. On these facts it was *held*, that the finding of the jury could not be construed as a finding that the prisoner was guilty of anything more than assault and battery, and that the entry of the general verdict of guilty in the record was unauthorized.

ERROR to *St. Clair* Circuit.

Wright was tried on a charge of assault with intent to murder one Woodward, *alias* Wagner, at Port Huron. The jury, having received the charge of the court, retired in charge of an officer, and shortly afterwards returned into court for further instruction as to whether the prisoner could be convicted under the information of assault and battery. The charge being again read to them (which distinctly instructed them that if the killing, in case death had resulted, would have been anything less than murder, the defendant was not guilty of the complete offense charged, but was at most guilty of assault and battery only, and that he might be convicted of that offense), they again retired. At about two o'clock in the morning the jury again returned into court, and being asked if they had agreed upon their verdict, the foreman handed to the clerk, and the clerk handed to the judge, a paper, which the judge thereupon read aloud, and then said to the jury: "Gentlemen, you say that you find the prisoner guilty as charged in the information, and that you recommend him to the mercy of the court; and so say you all;" to which the jury nodded assent; and the verdict so given was recorded, and the jury discharged. The paper which the jury handed in contained in writing, signed by all the jurors, the following: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information; also that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The court sentenced him to be imprisoned in the state prison for seven years.

*Atkinson Bros.* and *A. E. Chadwick*, for plaintiff in error.

*A. R. Avery*, Prosecuting Attorney, *A. J. Smith*, Attorney General, and *W. T. Mitchell*, for the people.

The court *held* that the written finding of the jury must con-

trol under the circumstances disclosed by this record as to what their real verdict was; that there being no such offense under our statutes as an assault with intent to kill, the statutory offense being an assault with intent to commit the crime of murder, this written verdict cannot be construed as a finding that defendant was guilty of anything more than an assault and battery; and that the sentence, therefore, was one not authorized by the verdict.

Judgment reversed, and prisoner discharged.

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SMITH vs. STATE.

(52 Ga., 88.)

ASSAULT WITH INTENT TO MURDER: *Sufficiency of evidence.*

On an indictment for assault with intent to murder, where the evidence showed a quarrel, in which the prosecutor struck the respondent in the face, the respondent then going to the house and coming out with two guns, and that the prosecutor then advanced towards the respondent with threatening gestures, taunting him to shoot, when the respondent shot, and that the prosecutor was a much more powerful man than the prisoner, it was *held*, that if death had ensued it would not have been murder, and the charge was not sustained.

In assault with intent to murder, every ingredient of murder must be present, except death, and where if death had resulted, the offense would have been manslaughter and not murder, the charge is not made out.

TOM SMITH was placed on trial for the offense of assault with intent to murder, alleged to have been committed on the person of one Arthur Jackson, on the 10th of May, 1873.

The defendant pleaded not guilty. The evidence for the state made, in brief, the following case:

Sam. Hunter and Steve Cody were playing marbles in the road, and Arthur Jackson was seated on the fence looking on, when defendant came up. He said to Jackson that he wanted to bite his ears like he used to bite them. Jackson replied that he should do no such thing. Defendant said, "Damn you, I will bite them anyhow." At the same time he jumped on Jackson and endeavored to bite his ears. Jackson pushed him off. He then grabbed at Jackson, scratching his face, causing the blood to flow. Jackson said that if a man played with him, he did not

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want him to tear the blood out, and to go off and let him alone. Defendant replied, "By G-d, may be you don't like it, and if you don't, you need not take it." Jackson told him to go off from him. He advanced on Jackson again, saying he would bite his ears some, and pulled him off the fence. Jackson caught him by the breeches and turned him over the fence backwards. He carried Jackson's hat over with him. Milton Gill, who was standing by, said, "Jackson, if you don't mind, you will break that nigger's neck." Jackson said to defendant that he did not intend to let him fall so hard, and asked him if he was hurt. He said he was not. Jackson asked him to hand his hat over. Defendant said, "Wait, damn you, let me hit you first." He then handed the hat over, contemporaneously hitting Jackson in the eye. He then got over the fence and caught Jackson around the neck, who said to him, "Smith, you ain't no man, go away; I could whip you with a hickory." He replied that it was a "G-d d--d lie, by G-d." Jackson said, "Smith, a man give me the damned lie in Covington this morning, and I hate for a man to keep on giving me the damned lie in cold blood." He replied that "it was a G-d d--d, h--ll fired lie, by G-d, and if you don't like it, you need not take it." Jackson slapped his face. He said, "Jackson, are you mad?" Jackson replied that he was not. He then said, "Stay here till I come back." He left and went home, which was about two hundred and fifty yards from the place where they were scuffling. Jackson moved away from the fence and sat down in the road. After the lapse of ten or fifteen minutes, he heard the defendant hollo, "Clear the way, you women and children, by G-d." He was about fifty yards from Jackson, and had two double barreled shot guns. Jackson jumped up and told him to shoot, that nobody was afraid. He placed the gun which he had in his right hand against the nearest paling, and took the other one from his shoulder. Jackson said, "Shoot ahead, here's your mule," and at the same time stepped to the side of and between the palings. The defendant fired. Jackson returned to the center of the road and asked him what he meant. He replied, "I mean to shoot you, G-d d--n you." Jackson said, "Shoot quick, for I am coming to you," at the same time advancing on him. When Jackson was within thirty yards of him a second shot was fired, the shot striking Jackson on the right side. Jackson told him to shoot again, as



he was coming at him. The defendant threw down the empty gun and took the other and half cocked it. Jackson was advancing on him so fast that he pulled the trigger, but the gun would not go off. He cocked it again, but by this time Jackson had reached him, and struck the muzzle of the gun. It went off and the shot lodged in his head. The last shot also struck his left arm. He seized the gun in his right hand and struck at the defendant's head. The blow missed his head, struck the ground, and broke the gun in pieces. Jackson had a switch in his hand at the commencement of the difficulty, about as large as his thumb. He threw it down in the road.

The evidence for the defense did not materially alter the case made by the state. It tended to show that Jackson was very violent in his conduct to defendant before the shooting, and that he commenced advancing upon the defendant as soon as he saw him with his gun, telling him to shoot, and that all three shots were fired under these circumstances. Also, that when Jackson struck at the defendant with the gun he did not miss him, but, on the contrary, cut his head very badly.

The jury returned a verdict of guilty. The defendant moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and defendant excepted.

*II. D. Capens, by J. J. Floyd, for plaintiff in error.*

*T. B. Cabaniss, Solicitor General, by Peebles and Howell, for the state.*

TRIPPE, J. It has been so often decided as to what the evidence must show, to sustain a conviction for the offense of an assault with intent to murder, that it is unnecessary to do more than merely to reiterate it here. Had death ensued from the assault, from the circumstances of the killing, the defendant would only have been guilty of manslaughter; he then cannot be guilty of an assault with intent to murder, when there is no killing. All the ingredients of murder, except the killing, enter into and are necessary to constitute the crime of assault with intent to murder. At least, there must be malice, express or implied, that would make the assailant a murderer, had he taken life in the assault. If there cannot be murder without malice, there cannot be an intent to murder unless the same element of

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malice appears. *Meeks v. The State*, 51 Ga., 429, and *Jackson v. The State*, id., 402. As this case goes back for another trial, the testimony will not be discussed here, further than to say that the record shows that the defendant had stopped and put down his guns when the prosecutor started towards him, with threatening invitations to shoot; that he was coming; to shoot quick; that he was coming to him, etc., etc. The defendant seems to have been but a weakling compared to the prosecutor, who had already shown his complete power to do as he might please with defendant. The evidence for the defense certainly makes out a case that would not have been murder had the defendant killed the prosecutor, and it could scarcely have been worse under the prosecutor's own statement, if what he says about the first firing be stricken out. As to that firing, it does not appear that the defendant shot at the prosecutor, or in what direction he did fire. It is probable he did fire at him, but the prosecutor says "he stepped to the side of and behind the palings." This was before the firing. The defendant was fifty yards off; some, and most of the witnesses, made it a good deal farther. The prosecutor then sprang out, rushed towards the defendant with the threatening declarations, and with the effort to do great violence to defendant when he reached him. It was under these circumstances the other firing took place. But the matter will be passed on again by a jury, and no further comment on the testimony will be made.

*Judgment reversed.*

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BARCUS vs. STATE.

(49 Miss., 17.)

ASSAULT WITH INTENT TO MURDER: *Intent.*

Where the evidence showed that the respondent shot at A. intending to kill him, but missed him and accidentally hit B., a by-stander, it was *held*, that he was not guilty of assault with intent to commit murder on B.

Intent may be inferred from the act, but there is no artificial rule of law which requires or allows a particular intent to be presumed from given facts, where the undisputed evidence shows that no such intent was in fact entertained.

In assault with intent to murder, there must be an intent to kill the person assaulted.

TARBELL, J. At the last March term of the circuit court of

Warren county, the plaintiff in error was indicted, tried and convicted on a charge of shooting at Sandy Mitchell with intent to kill. From the judgment against him the accused prosecuted a writ of error, and asks here a reversal of that judgment upon several grounds not essential to repeat or discuss. Upon the trial, the right of the city police to arrest vagrants, without warrant, was made a prominent point, and is again pressed in the argument in this court, but we do not think that question involved at present. There is a fatal error, however, in this case, and it is this: There is no evidence that the accused shot at Sandy Mitchell. The proof is, that he shot at Henry Creighton, and according to his own declarations subsequent to the shooting, intended to kill him. Upon this point there is no conflict in the evidence. It is positive and uncontradicted, that he shot at Henry Creighton, accidentally hitting Sandy Mitchell, an innocent by-stander. The verdict is wholly unsupported by the evidence. It is true, that the jury, in response to the instruction for the state have found, in substance, that the accused shot at Sandy Mitchell with the intent to kill and murder him; but the verdict must have been through some misapprehension of law or fact. There is no doubt of the rule, that a man shall be presumed to intend that which he does, or which is the natural and necessary consequence of his act; and that malice, in this class of cases, may be presumed from the character of the weapon used. If the evidence in the case at bar was limited to the mere fact of shooting and the striking of Mitchell as the result of the shot, or if the evidence as to the person intended to be killed was conflicting, we might accept the verdict as conclusive; but the record before us leaves no question or doubt. Indeed, it is conclusive that Creighton and not Mitchell was the person aimed at and designed to be hit. To sustain the indictment in this case, it was incumbent on the part of the state to prove that the accused shot at and intended to kill Mitchell, whereas the proof is that he shot at Creighton with the intent to kill him. The essential averments of the indictment are, therefore, not only not sustained, but absolutely negatived. It follows that the indictment should have charged the shooting to have been at Creighton, and the result is, the judgment must be reversed and the indictment quashed, but the accused cannot be set at liberty. He will be detained in custody to await a trial under another indictment, to

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be drawn as herein indicated. 13 S. & M., 242; 11 id., 317; 24 Miss., 54; Code, § 2497.

Judgment reversed, and cause remanded, with a recommendation to the district attorney to quash this indictment, and instructions to the proper authorities to detain the accused, subject to the action of the circuit court of Warren county.

*Judgment reversed.*

## STATE vs. UNDERWOOD.

(57 Mo., 40.)

HOMICIDE: *Change of venue — Discretion — Degrees of murder — Self defense — Defense of property — Presence of respondent during argument of interlocutory motion — Seclusion of jury.*

Under a statute regulating changes of venue, one section provides that no second change of venue shall be had. Another section provides that a change of venue shall be had when the judge has been of counsel in the cause. Where in a change of venue the cause was removed to a circuit where the judge had been of counsel in the cause, it was *held* that a second change of venue was properly had, notwithstanding the provision of the section first mentioned.

Whether or not a co-respondent, indicted as an accessory, shall be first tried so that his testimony may be had for the defense on the trial of the principal, is a matter in the discretion of the trial court, and the supreme court will not review the exercise of that discretion where there is no evidence that it has been abused.

On a trial for homicide it appeared that at the time of the killing, the deceased was engaged in moving a line fence between himself and respondent. It appeared also that the fence had been built by and belonged to deceased, but that it had been built on respondent's land: *Held*, that respondent had no right to resort to violence to prevent deceased removing the fence, and that evidence as to the respective rights of the parties to keep the fence where it was was irrelevant and inadmissible.

Where the jury finds the respondent guilty of murder in the first degree, under instructions properly defining murder in the first degree, it *seems* that respondent would not be prejudiced by an erroneous instruction as to murder in the second degree.

Where the evidence shows that respondent killed deceased with a gun loaded by powder and bullets, the law presumes the killing to be intentional, and that it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to show from the evidence in the cause, to the reasonable satisfaction of the jury, that he is guilty of a less crime, or that he acted in self-defense.

In cases of homicide, if circumstances of wilfulness and deliberation are not

proved, the law presumes the killing to be murder in the second degree only.

One who seeks and brings on a difficulty cannot shield himself under the plea of self-defense, however imminent the danger in which he finds himself in the progress of an affray.

It is not necessary that respondent should be present in court during the argument of a motion for a new trial, if he is present when it is finally determined.

After the jury had retired, two witnesses necessarily passed through the jury room to get down stairs, but without any communication with the jury: *Held*, no ground for setting aside the verdict.

The affidavits of jurors are receivable in support of their verdict to show that nothing improper occurred during their consultation.

WAGNER, J. This was an indictment for murder in the first degree, found in the Ralls county circuit court against the defendant and six others, for the killing of one Richard Menifee.

The defendant was charged as principal in the first degree, and the others were charged as being present, aiding, abetting and assisting in the murder.

Upon the application of the defendants, a change of venue was granted to the circuit court of Macon county, and when the case was called for trial, a new judge having in the meantime been elected, who had previously been of counsel for defendants, a suggestion of that fact being made, the case was sent to Marion county, in another judicial circuit, for trial.

When the case was called, the attorneys prosecuting for the state announced themselves ready for trial, and the defendant and Samuel Scobee, who was included in the indictment as a co-defendant, moved for a separate trial. Scobee asked that he might be first tried, and defendant demanded that Scobee should be first tried, alleging that he wanted the testimony of Scobee to be used on his trial. The circuit attorney then moved that the defendant be first tried, as he stood charged as principal in the first degree, and Scobee was only charged with aiding and abetting. The court sustained this motion, and ordered the prosecution to proceed against the defendant, and to this ruling exceptions were duly saved.

It seems that the difficulty between Menifee, the deceased, and the defendants in the indictment, had its origin in the removal of a fence which separated the farms of the respective parties. The true line was not accurately fixed, but enough was known to render it certain that the fence was placed upon the land of the

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Underwoods, the defendants. Menifee had built the fence and it belonged to him, and at the time the homicide was committed he, with his brother, was in the act of removing it and putting it upon his own land. To this defendants objected, as it would expose their crops. Defendant and Menifee had had some difficulty the evening before, and on the morning of the murder, Menifee brought a shot-gun with him when he went to his work in tearing down and rebuilding the fence.

The main witness for the prosecution was the brother of the deceased, who was assisting him at the time. He says that while they were staking off the line, he looked out and saw two men, defendant and Scobee, and when they saw witness and the deceased, defendant started towards them, and then stopped and made a motion to Scobee to go west; Scobee got on his horse and went in that direction, and defendant went south towards Stephen Underwood's (his father's) house. The work continued, and in a short time Stephen Underwood came, and he said to the deceased that the boys were not going to let him move that fence. Deceased then said there was a legal way to stop them from moving the fence, and the old man said he would see as soon as he could get the boys and their arms. Stephen Underwood then went towards his house. Witness and deceased then went to another portion of the fence and commenced tearing it down, when, in about half an hour after Stephen Underwood left, he returned, and upon looking up witness, told his brother that he saw Stephen Underwood, William Underwood, Strother Underwood, Wesley Underwood (defendant), Frank Underwood, Asa Underwood, and Samuel Scobee. They were about a quarter of mile off when he first saw them. Scobee and Strother Underwood were coming from the west until they got to his brother's fence, and then they came up the fence. Stephen and Frank Underwood were coming up the fence from the south; the other three were coming up about twenty steps from the fence. The old man ordered witness to stop tearing down the fence, but he kept on. They then had an altercation between themselves. Defendant Wesley Underwood started from the edge of some plowed ground opposite Richard Menifee, the deceased, with his gun presented towards him, in a position to shoot; Richard then picked up his gun; both fired; the shots were so near together that witness could not tell which fired first. Richard was shot

and fell; he then raised himself up on his knees and shot again. The Underwoods then ran towards him and were shooting and beating him. Witness heard some three or four shots. Some had sticks, some guns and some pistols; saw some three or four blows, could not tell how many. The deceased, after he was shot down, was repeatedly struck with a gun, on his breast, neck and head, and died in a short time thereafter. The shots were mortal. There was no other eye witness on the part of the state, but there was corroborative evidence as to the number of shots, etc., by those who were working in the immediate neighborhood.

William Collins was a witness for the state, and he testified that he lived within less than a quarter of a mile of Stephen Underwood, and he explained the situation of his farm and the Underwood and Meniffee farms, and stated in his testimony that the Underwoods had joined on his fence without permission. To this testimony, as to Underwood's joining witness' fence without permission, defendant's counsel objected, and the court sustained the objection; but the evidence was given in a narrative form, and the remark was made before the witness could be stopped.

For the defense, Mrs. Amanda Scobee, wife of Samuel Scobee and sister of the defendant, stated that on the morning of the murder she started out to the field, and saw her husband and Strother Underwood riding in the direction of where Meniffee was tearing down the fence, and that she went on up to the fence and was within thirty or forty rods of where Meniffee and defendant fought; that when she got there all the defendants and Richard and John Meniffee were there; Richard and John were tearing down the fence. She then speaks about the difficulty that took place between John Meniffee and her father, and after that Richard Meniffee then said: "There is Wesley (defendant), and by God I will kill him, anyhow," and picked up his double barreled shot gun and fired at Wesley as he picked up his gun. Strother said, "For God's sake, Dick, don't shoot." Dick shot Wesley, and Wesley shot Dick. They fired two shots each; Dick was killed and Wesley was badly wounded, and pulled open his shirt and said he was killed.

The witness then testifies that she and her husband did what they could to administer to the comfort of the deceased while he lived, and in the continuation of her testimony she says that

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Dick and Wesley each had a double barreled shot gun; that there were four shots fired in all, and that after the firing, Wesley and Dick came together and clenched and fell. John Menifee then ran up and pulled Wesley off from Dick; Wesley picked up a gun and turned on John and struck him, and then turned on Dick and struck him several times with the gun. Franklin Underwood, another brother of the defendant, testified that he had been at home sick, and was in the house when Wesley, the defendant, came and got his gun, and said the Menifees were pulling down the fence, and started off in that direction. Witness then put on his coat and followed after him; he saw the whole encounter, and gives essentially the same version of it that Mrs. Scobee does in her testimony. Some other evidence was introduced, which was unimportant. The defense then offered to prove that the Underwoods had joined their fence to Menifee's with the latter's permission. This evidence was objected to by the state, and the objection sustained.

For the state the court gave twelve instructions; the sixth, seventh and eighth are the ones objected to in this court.

The sixth instruction told the jury that if the defendant killed Menifee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree in the absence of proof to the contrary, and that it devolved upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self defense.

By the seventh declaration the jury are instructed that if they believe, from the evidence, that Richard Menifee was engaged in pulling down his fence, and that the defendant came to where said Menifee was at work, armed with a loaded gun, for the purpose of compelling said Menifee to desist from pulling down the fence by force, and approached said Menifee in such a manner as to give Menifee reasonable cause to apprehend a design on the part of defendant to kill him, or to do him some great bodily harm, unless he desisted from pulling down the fence, and there was reasonable cause to apprehend immediate danger of such design being accomplished, then the killing of said Menifee by defendant was not justifiable homicide.

The eighth instruction tells the jury that if they find, from the evidence, that defendant and deceased had a difficulty which re-

sulted in the death of the deceased, and that defendant commenced the difficulty, or brought it on by any wilful and unlawful act of his, committed at the time, or that he voluntarily and of his own free will and inclination entered into the difficulty, then there is no self defense in the cause, and they should not acquit on that ground; and in such case it made no difference how imminent the peril might have been, in which the defendant was placed during the difficulty. There is a second instruction numbered six, which told the jury that if they should find, from the evidence, that Richard Menifee was engaged in pulling down his fence, and that Wesley Underwood came to where said Menifee was at work, armed with a loaded gun, for the purpose of compelling said Menifee to desist from pulling down the fence by force, and approached said Menifee with his gun held in a position to shoot, then the killing of said Menifee by said Wesley Underwood was not justifiable or excusable homicide.

On the part of the defense, the court instructed the jury: First, that defendant had a right to carry his double-barreled shot-gun, and that if they found, from the evidence, that whilst so carrying it, he made no threat, menace, or demonstration to shoot Richard Menifee, and if they should further find, that said Menifee, without being threatened by defendant, or menaced by him in any hostile manner whatever, picked up his gun and declared that he would kill defendant, and then and there presented his gun, loaded with powder and bullets or shot, at defendant, in a shooting position, then in such case, defendant had a right to shoot said Menifee in self defense, and even to take his life in order to save his own; secondly, that if the jury believed, from the evidence, that defendant, at the time he shot and killed Richard Menifee, had reasonable cause to apprehend a design on the part of said Richard Menifee, to commit a felony upon him, or to do him some great personal injury, and that there was reasonable cause to apprehend immediate danger of such design being accomplished, then, in such case, defendant had a right in defense of his own person to shoot and even to kill the said Richard Menifee, unless the defendant sought and provoked the difficulty; thirdly, that defendant had a right to go, either alone or with others, to the point where Richard Menifee and his brother were tearing down the fence, for the purpose of remonstrating with them, in a peaceable manner, to dissuade them from pulling down the fence,

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and if the jury believed, from the evidence, that whilst defendant or others were so engaged, in a peaceable manner, remonstrating against the tearing away or removal of said fence, Richard Meniffee picked up his gun, loaded with powder and bullets or shot, declaring that he would kill defendant, and then and there presented his gun at defendant in a hostile manner, then defendant had a right, in the necessary defense of his own person, to shoot and kill the said Richard Meniffee, and the jury ought to find a verdict of "not guilty."

The jury rendered a verdict of murder in the first degree, and it is to reverse the judgment entered therein that this appeal is presented.

There is no merit in the point raised, that the second change of venue was improperly granted, and that the circuit court of Marion county had no jurisdiction.

Aside from the fact that no exceptions were taken to the order, the statute settles the question conclusively. The act in reference to criminal practice (2 Wagn. Stat., § 15) provides that when any indictment or criminal prosecution shall be pending in any circuit court, the same shall be removed by the order of such court, or the judge thereof, to the circuit court of some county in a different circuit, in either of the following cases: First, when the judge of the court in which such case is pending, is near of kin to the defendant, by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause. The 20th section of the same act declares that whenever it shall be within the knowledge of a court or judge, that facts exist which would entitle a defendant to the removal of any criminal cause, on his application, such court or judge may make an order for such removal, without any application by the party for that purpose. And although the 27th section says, that in no case shall a second removal of any cause be allowed, yet this court has decided that a second change of same may be granted where the judge has been counsel in the cause, notwithstanding the above provision. *State v. Gates*, 20 Mo., 400. It is true that in this last case, the judge who awarded the change of venue had been the prosecuting attorney, but that makes no difference, as

the 15th section applies justly and properly to every judge, whether he has been counsel for either the plaintiff or defendant.

It is next insisted, that Scobee should have been first tried, in order that the defendant might have had his testimony upon the trial. But upon this point there is nothing to show that the court exercised its discretion unsoundly. It is the practice in criminal cases, where a codefendant has been included in the indictment by mistake, or facts and circumstances are shown, by which it is apparent that no verdict of guilty can be obtained against him, to allow him to be first tried, so that he may be restored to his rights as a witness. The exercise of this power is usually called forth where there is a joint trial. Where, in the case of a joint trial, the evidence in behalf of the prosecution is all in, and there is no testimony implicating one of the defendants, it is then the duty of the court to permit the verdict to be immediately taken, acquitting this one, and then he will be a competent witness for the rest. If there is some evidence, though slight, against the defendant whose testimony is thus desired by the others, the court may, in its discretion, submit his case to the jury at this stage of the trial; and if he is acquitted, he will be a competent witness. 1 Bish. Crim. Proc., § 962; *State v. Roberts*, 15 Mo., 28; *Fitzgerald v. The State*, 14 id., 413.

In this case the defendants were severed in the trial. No facts were brought to the attention of the court, which made it imperatively necessary to comply with defendant or Scobee's demand, and the court simply exercised a discretion which we will not revise. Of course a person indicated as an accessory, or principal in the second degree, may be put upon his trial before the principal in the first degree is tried or convicted, but that question has nothing to do with the ruling of the court here.

The court very properly excluded the testimony tending to show that defendant joined his fence with that of the deceased by permission. No such issue was raised in the case, and if the permission had been granted, it would not have justified or excused the offense.

The defendant had the right to remonstrate with the deceased against his act, whether the fence was joined by permission or not, but he had no right to resort to violence, in order to prevent its being torn down. Upon this point, the court gave an instruction presenting the question in favor of the defendant, in

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the strongest light. The evidence of Collier, about the defendant joining to his fence without leave, was not called out by the prosecution. The witness was giving his testimony in the narrative form, and used the remark before any objection was made. As soon as it was objected to, the court promptly ruled it out. It could not be withdrawn, for it was already uttered, and if the defendant considered that it was in anywise injurious to him, his counsel should have procured an instruction telling the jury to disregard it. The 6th instruction is the one most strongly objected to, and that, as before stated, told the jury that if the defendant killed Menifee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree, in the absence of proof to the contrary, and it devolved upon the defendant to show from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense. It is difficult to perceive how this instruction could have injured the defendant, as the jury did not find him guilty of murder in the second degree, but they convicted him of a different and higher grade of offense, namely, murder in the first degree upon an instruction which had previously been given, requiring them, before they could convict of that degree, to find that the killing was wilful, deliberate and premeditated. But the instruction is unobjectionable. To constitute murder in the first degree, it is necessary that circumstances of wilfulness and deliberation shall be proven. This proof, however, need not be express or positive. It may be deduced from all the facts attending the killing, and if the jury can reasonably and satisfactorily infer from all the evidence, the existence of the intention to kill, and the malice of heart with which it was done, it will be sufficient. But if circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree only. This question was fully discussed in a quite recent case in this court (*State v. Holmes*, 54 Mo., 153), and the settled doctrines in this state reviewed and reiterated.

The 8th instruction is based on the well settled doctrine that a party who seeks and brings on a difficulty cannot avail himself of the right of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the

affray. *State v. Starr*, 38 Mo., 270; *State v. Linney*, 52 id., 40.

The 9th instruction is predicated upon the hypothesis that there was a mutual and voluntary combat. If that were so, defendant could not rely on self-defense. For, where parties by mutual understanding, engage in a conflict, and death ensue to either, the slayer will be guilty of murder.

The second instruction given for the defendant, being the first adverted to in a prior part of this opinion, gave the accused the full benefit of all he could claim in regard to the right of self-defense. The third fully justified him if he acted on appearances, grounded on reasonable cause of apprehended danger, and was surely sufficiently favorable. And the fourth declares, that if, whilst defendant was remonstrating with Menifee against tearing down the fence, the latter picked up his gun, threatening to kill defendant, and presented the same at defendant in a hostile manner, then the defendant had the right, in the necessary defense of his person, to shoot and kill the deceased. When the instructions are all taken together, they lay down the law with such manifest fairness, and withal are so just to the defendant, that it is impossible to find any real or tangible ground for complaint.

It is further contended that the defendant was not present in court during the whole progress of the trial, and therefore the judgment is erroneous. Upon this point the record shows that whilst the prisoner was in jail, the attention of the counsel in the cause was called by the court to the causes assigned for a new trial, and thereupon it was suggested by the prosecuting attorney that the prisoner should be brought into court; the court then announced that it would not be necessary, as no action would be taken on the motion at that time; but that the court, with a view of understanding the legal question, desired a reference to certain authorities relied on, and also the view of counsel thereon. Authorities were read, and the counsel, both for the state and for the defendant, stated their views of the legal question involved in the absence of the defendant. The further hearing of the motion then passed over until another day, at which time the defendant was present, whereupon the motion was taken up, and after counsel on both sides had read the authorities relied on by them respectively, and submitted their views, the court

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overruled the motion. Every person indicted for a felony must be present during the trial (2 Wagn. Stat., p. 1103, § 15); but here no step was taken in the trial during the defendant's absence. After the trial was over, the court requested the attorneys to furnish it with any authorities they might have, bearing on a legal question involved in the motion for a new trial, and also to state their views concerning the same; but no farther action was taken; no ruling was made, and nothing transpired having any reference to the progress of the trial. When the time arrived for the court to proceed with the determination of the motion, the defendant was present, the final argument was then made, and the court acted in his presence. This point must be ruled against the defendant.

One more objection only remains to be noticed. It appears that before the case was given to the jury, and whilst they were still in the court room, two witnesses from Ralls county who were present on the part of the state, ascended to the cupola of the court house for the purpose of obtaining a view of the town. The stairs by which they went up led from a door in one corner of the county clerk's office. Whilst they were on the court house, the jury were conducted by the sheriff into the county clerk's office, the room set apart for them, for consultation. The men, not knowing that the jury were there, descended in the same way that they had gone up, and then opened the door and passed immediately out of the room. The jury were in another corner of the room, and no word of communication was had between the jury and the witnesses. These facts are abundantly established by the affidavits of the two men themselves, and by the sheriff and his deputy, and by several of the jurymen. Whilst I agree that any tampering with a jury, however slight, may be sufficient to set aside their verdict, the case here shows most conclusively that there was neither tampering, misbehavior, nor any improper conduct whatever.

These facts are perfectly evident without regard to the affidavits of the jurors. But I do not think that the court erred in receiving the affidavits of the jurors. The rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict. But



they may testify in support of their verdict, that no disturbing influence was brought to bear upon them, and that they were not interfered or tampered with. This question was elaborately considered, and all the leading authorities collated and reviewed in *Woodward v. Leavitt*, 107 Mass., 453, and the doctrine was declared to be as above stated.

I think the court did not exercise its discretion unsoundly in refusing to sustain the motion in this respect. Upon an examination of the whole record, I have discovered no material error.

*Judgment affirmed.*

The other judges concur.

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JONES *vs.* COMMONWEALTH.

(75 Pa. St., 403.)

HOMICIDE: *Distinction between murder in the first and murder in the second degrees — Deliberation and premeditation.*

The respondent pleaded guilty to an indictment for murder. In accordance with the statute, the trial court heard evidence of the circumstances of the case, and adjudged the respondent guilty of murder in the first degree. A request having been made for special findings, and for filing the testimony on which the findings were based, the record was removed to the supreme court by a writ of error, and the judgment of the trial court reversed, and the respondent adjudged guilty of murder in the second degree.

The respondent had taken to hard drinking on account of the continued adulteries of his wife. He had attempted suicide by taking laudanum, and although his life was saved, continued up to the time of the killing in a constant state of nervous excitement, drinking, and keeping laudanum about him. On the day of the homicide he was in a state of high nervous excitement, and acted like a crazy man. On the evening of the killing, he went to the house of the deceased, his wife's mother, between nine and ten o'clock. He said he had come to settle the fuss. His mother-in-law told him to go. He stepped back. She picked up a stool, and said she would level him with it if he did not go. He said, "I'll level you now," and immediately pulled out a pistol and shot her. Previous to this he had been on good terms with her. *Held*, murder in the second degree, there not being sufficient evidence of premeditation and deliberation.

AGNEW, C. J. In this case, if we confine our attention to the weapon, its previous preparation, the threat proved by Mr. Crooks, the time for deliberation, and the circumstances of the killing of Mrs. Hughes by the prisoner, we might conclude that

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his crime was murder in the first degree. In this respect the learned judge of theoyer and terminer had sufficient evidence justify his finding of the degree. But ample time for reflection may exist, and a prisoner may seem to act in his right mind, and from a conscious purpose; and yet causes may affect his intellect, preventing reflection, and hurrying onward his unhinged mind to rash and inconsiderate resolutions, incompatible with the deliberation and premeditation defining murder in the first degree. When the evidence convinces us of the inability of the prisoner to think, reflect and weigh the nature of his act, we must hesitate before we pronounce upon the degree of his offense. That reasonable doubt which intervenes to prevent a fair and honest mind from being satisfied that a deliberate and premeditated purpose to take life existed, should throw its weight in the scale to forbid the sentence of death. Intoxication is no excuse for crime; yet when it so clouds the intellect as to deprive it of the power to think and weigh the nature of the act committed, it may prevent a conviction of murder in the first degree. The intent to take life, with a full and conscious knowledge of the purpose to do so, is the distinguishing criterion of murder in the first degree; and this consciousness of the purpose of the heart is defined by the words deliberately and premeditatedly. Much has been said upon the meaning of these words, some of which may mislead, if we do not consider well the cases in which it has been uttered. In the *Commonwealth v. O'Hara*, tried in 1797, Chief Justice McKEAN said: "What is the meaning of the words deliberately and premeditatedly? The first implies some degree of reflection. The party must have time to frame the design. The time was very short; it cannot be said to be done coolly. The legislature must have put a different construction on the words deliberately and premeditatedly. If he had time to think, then he had time to think he would kill. If you are of opinion he did it deliberately, with intention to kill, it is murder in the first degree. If he had time to think, and did intend to kill, for a minute as well as an hour, or a day, it is sufficient." The correctness of this charge to the jury will not be doubted, if we examine the circumstances, and yet this is essential to understand it properly. O'Hara was a journeyman shoemaker, sitting on his bench at work with Haskins and others. Aitkins, the deceased, his friend, came up stairs and said to him: "I have

been talking about you below, this hour." "Yes," said Haskins, "about the five sheep you stole." Thereupon O'Hara *immediately* left his work upon the bench, took up a shoemaker's knife by his side, went up to Aitkins, and stabbed him in the belly. The act was not thoughtless, for the prisoner had time to lay down his work, take up the knife, rise and walk up to his friend, and to strike him in a vital part with an instrument of death. Upon every principle of human action, we must conclude, under these circumstances, that O'Hara intended to take Aitkins's life, otherwise the thoughts of men never can be determined from clear and distinct acts evidencing the purpose of the mind. There was irritation, it is true, heightened by the previously existing story about the sheep; but it was without any just cause or provocation to take life, and, therefore, evidenced a heart malignant, and ready to execute vengeance even upon a friend, in a moment of wicked passion. In such a case, a moment was sufficient to form and deliberate upon the purpose to take life, and premeditate the means of executing it. But these words of the chief justice are sometimes wrested from their application and applied to cases where reason has been torn up by the roots, and judgment jostled from her throne.

Another case, often quoted and misapplied, is that of Richard Smith, tried before President Rush, in 1816. Smith had become intimate with the wife of Captain Carson, and had a difficulty with him in his own house. He returned with Mrs. Carson, and went with her up into the parlor. Carson came up unarmed, and ordered him to leave. Smith had armed himself, and held one hand under his surtout, and the other in his breast. Carson told Smith that he had come to take peaceable possession of his own house, and the latter must go. Smith said to Mrs. Carson, "Ann, shall I go?" She replied, "No." Smith moved into the corner of the room, Carson following him, and telling him he must go, at the same time letting his arms fall by his side, and saying he had no weapon. Upon this, Smith drew a pistol from under his surtout and shot Carson through the head, threw down his pistol and ran down stairs. In this state of facts, Judge Rush, charging upon the subject of deliberation, said: "The truth is, in the nature of the thing, no time is fixed by law, or can be fixed, for the deliberation required to constitute the crime of murder." Speaking, then, of premeditation, he

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says: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind the scheme of murder, and to contrive the means of accomplishing it." We cannot doubt the correctness of these remarks in the case in which they were made, but cases often arise where this readiness of intent to take life, when imputed, may do great injustice. Hence it was said in *Drum's Case*, 8 P. F. Smith, 16: "This expression (of Judge Rush) must be qualified, lest it mislead. It is true that such is the swiftness of human thought, no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose; yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind fully and consciously the intention to kill, and to select the weapon or means of death, and to think and know before hand, though the time be short, the use to be made of it, then there is time to deliberate and premeditate." This was said in the case of a sudden affray, where the circumstances made it a serious question whether the act was premeditated, or was the result of sudden and rash resentment.

Thus we perceive, that at the bottom of all that has been said on the subject of murder in the first degree, is the frame of mind in which the deadly blow is given; that state of mind which enables the prisoner either to know and be fully conscious of his own purpose and act, or not to know. Why is insanity a defense to homicide? Because it is a condition of the mind which renders it incapable of reasoning and judging correctly of its own impulses and of determining whether the impulse should be followed or resisted. Intelligence is not the only criterion, for it often exists in the madman in a high degree, making him shrewd, watchful and capable of determining his purpose, and selecting the means of its accomplishment. Want of intelligence, therefore, is not the only defect to moderate the degree of offense; but with intelligence there may be an absence of power to deter-

mine properly the true nature and character of the act, its effect upon the subject, and the true responsibility of the actor; a power necessary to control the impulses of the mind, and prevent the execution of the thought which possesses it. In other words, it is the absence of that self-determining power, which in a sane mind renders it conscious of the real nature of its own purposes, and capable of resisting wrong impulses. Where this self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influences, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. We must, however, distinguish this defective frame of mind from that wickedness of heart which drives the murderer on to the commission of his crime, reckless of consequences. Evil passions do often seem to tear up reason by the root, and urge on to murder with heedless rage. But they are the outpourings of a wicked nature, not of an unsound or disabled mind. It becomes necessary, therefore, to inquire, upon the evidence in this case, whether the prisoner was really able to deliberate and premeditate the homicide.

William S. Jones had been upon bad terms with his wife. She had become too intimate with another Jones called Charley. William S. Jones, failing to break off the association, got to drinking hard, and finally, after another quarrel with his wife on the 10th of June, 1871, attempted suicide by taking a large quantity of laudanum. Dr. Davis found him lying on a lounge partly insensible, eyes nearly closed, pupils contracted, and face discolored by congestion. Energetic remedies were used, and he was so far restored as to be out of danger; but the effects of the laudanum remained. From this time until the night of the 19th of June, when he took the life of Mrs. Hughes, his mother-in-law, he was in a constant state of nervous excitement, continued drinking, and had bottles of laudanum about his person. Many witnesses describe him as without sense, constantly talking nonsense, wild in appearance, and incoherent in speech. Some say he acted like a man drinking hard, was intoxicated, and once fell from a horse. Others described him as looking crazy, talking to himself, his hands going, his head thrown back, walking to and fro, throwing his head about, swinging his arms, and wild, nervous and excited. He would jump upon a chair and begin to

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preach, and run off upon Charley Jones and his wife; said he was going to build a tavern on the mountain, and a church beside it; claimed all the property about, and was evidently much out of the way. These appearances were particularly noticed on the 19th day of June, the day of the homicide. He was then on very bad terms with his wife, yet seeking her and remonstrating with her, and on the afternoon of that day, he had beaten and abused her, chasing her down stairs and into the street, and there striking and kicking her, until separated by others. He continued in this condition down into the night of the 19th, when he came to Mrs. Hughes's house, between nine and ten o'clock. Stepping inside of the door, he asked Mrs. Hughes if the fuss was settled; said he had come down to settle it. She rose and told him to go away; told Lizzie to fetch the poker; said she would strike him if he did not go away. He stepped back. She picked up a stool, and told him if he did not go away, she would level him with it. He said, "I'll level you, now;" pulled out a pistol, stepped forward and shot her. Mrs. Hughes twice exclaimed, "I am shot," and went back into the kitchen, while Jones was seized by the persons present, and the pistol wrested from his hand. Between him and Mrs. Hughes there had been a state of good feeling, before he took the laudanum, and she attended him upon the day when he was under its influence. He spoke of her as his best friend. His conduct towards his wife, her daughter, had led Mrs. Hughes to resent it, and some feeling had arisen on the part of Jones, but after his arrest, he said he took the pistol to kill his wife, and the old woman had got it.

Looking, then, at the state of Jones' mind, from the 10th until the 19th of June, and down to the very moment he fired the pistol, and also at the suddenness of his quarrel with Mrs. Hughes; her call for the poker, and lifting the stool, it seems to us a matter of grave doubt whether his frame of mind was such that he was capable either of deliberation or premeditation. It appears to have been rather the sudden impulse of a disordered brain, weakened by potations of laudanum and spirits, and of a disordered mind, led away from reason and judgment by dwelling upon the conduct of his wife, influenced by his continued state of excitement. It presents a case of the preparation of a weapon, and an undefined purpose of violence to some one, where the time for reflection was ample; but where the frame of mind

was wanting, which would enable the prisoner to be fully conscious of his purpose, or to resolve to take the life of the deceased with deliberation and premeditation. Yet it was clearly murder, done without sufficient provocation, and without necessity, and in a frame of mind evincing recklessness and that common law malice, which distinguishes murder from manslaughter. There was error, therefore, in ascertaining the degree, and sentencing to death.

The judgment of the court of oyer and terminer of Luzerne county is reversed, and this court proceeding now to determine, upon the same evidence, the degree of the crime whereof the said William S. Jones is convicted by his own confession, now finds and declares that the crime of the said William S. Jones is murder in the second degree, and gives judgment accordingly, and forasmuch as the said William S. Jones is confined in the public jail of Luzerne county, distant herefrom, it is further ordered that the record, together with this finding and judgment be remitted to the said court of oyer and terminer of Luzerne county, with a direction to the judges thereof to proceed to pronounce sentence upon the said William S. Jones, as for murder in the second degree, according to law, and for such term of imprisonment at labor, as they, the said judges, shall adjudge to be a fit and proper punishment for his said offense.

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### McCUE *vs.* COMMONWEALTH.

(78 Pa. St., 185.)

HOMICIDE: *Evidence to show motive — Degree of murder — Practice.*

On a trial for felonious homicide, any evidence tending to show that the respondent was jealous of the deceased is admissible as tending to show a motive.

On a trial for felonious homicide, no presumption arises from the killing, of an offense higher than murder in the second degree.

The facts in this case *held* sufficient to sustain a verdict of guilty of murder in the first degree.

Where the record does not show affirmatively that before sentence was pronounced the respondent was asked if he had anything to say why sentence should not be passed upon him, sentence will be reversed and the prisoner remanded to be sentenced afresh, but the verdict is not affected.

AGNEW, C. J. We think the assignments of error in this case fail to show any ground for reversal, except of the sentence of

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the court of oyer and terminer. It was certainly competent to show, that the prisoner and the deceased had visited the same woman, and to follow this by evidence, that immediately after the homicide, the prisoner referred to the fact that he warned the deceased to let her alone, that she would be a curse to any one, and now his words had come to pass. Jealousy is among the strongest of the human passions, and it certainly was for the jury to determine, in the absence of any other assignable motive, whether it was the cause of the prisoner's act. The deceased and the prisoner had been apparently upon good terms, and lived together as single men. The witness, Amelia Wertman, testified that she was engaged to the deceased, and that the prisoner had visited her, and proposed to her to run away. If nothing had been secretly rankling in his heart, the shooting under the circumstances stated was singular and scarcely to be accounted for. The evidence of intoxication at the time of the shooting is very slight, and the degree of intoxication must have been very little. Afterwards he appears to have been a good deal more so, though not excessively drunk.

There was no evidence that the deceased had used threatening language or acts towards the prisoner. Hence the answer of the count to the fifth point was correct. The facts were referred to the jury. The only material question is, whether the evidence in the case contained the elements, or "ingredients" of murder in the first degree. It is certainly true, that the commonwealth must establish the existence of these elements, otherwise no presumption arises from the killing, of an offense higher than murder in the second degree. But if the evidence may reasonably admit of the conclusion, that the murder was wilful, deliberate and premeditated, it is for the jury to pronounce upon the degree of the crime, and a court of error will not reverse. In giving an interpretation to the act of February, 1870, we have said, if there have appeared in the testimony the ingredients to constitute murder in the first degree, our power ceases. We do not sit here to hear the case as upon a motion for a new trial, to determine where the weight of evidence lies, but "to determine whether the ingredients necessary to constitute murder in the first degree shall have been proved to exist." These being proved, the jury must determine the guilt or innocence of the prisoner. *Grant v. Commonwealth*, 21 P. F. Smith, 495.

This leads us to inquire into the circumstances of the killing. But one witness, Charles McCarty, was present. His account of the affair is concise and clear. On Sunday, October 25, 1874, McCarty was with the prisoner, who invited him to come into the house where he and the deceased lived. On going in, Dieter, the deceased, was lying in a bunk, apparently asleep. McCue, the prisoner, and McCarty took a seat by the window and took a drink of wine. McCue gave McCarty something to apply to his sore eyes, and while he was applying it, McCue was hunting for some money in his pockets, took off his vest, and laid a pistol on the window sill. McCarty said, "Barney, do you carry a pistol?" He said he did; it stood him in hand to, and he would use it probably before I thought. Dieter jumped up and said, "You are always talking of putting a bullet into somebody. If you think you can put one into me, come out and try it." He then made for the door, and Dieter ran against him outside of the door, throwing him upon his hands and knees. While they were going out, McCue grabbed the pistol from the window and followed. The witness ran across the street, and McCue followed Dieter closely, and when within four feet of him fired, the ball entering Dieter's right side, in front, between the seventh and eighth ribs. Dieter said, "Barney, you have put one of them into me;" and approached McCue. McCue raised the pistol, and Dieter knocked it out of his hand, closed with McCue, threw him down, and choked him until McCue gave up.

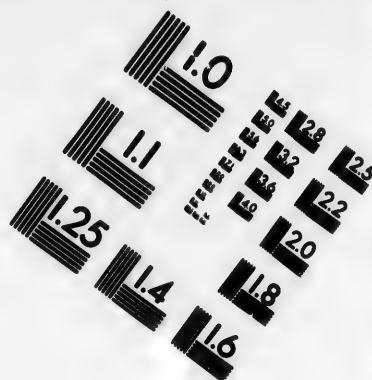
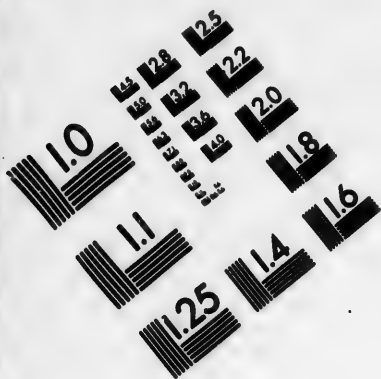
The pistol was picked up and found cocked. One load was discharged, two loads remained in it, and the fourth chamber seemed not to have been charged. These are the important facts bearing upon the shooting. The act was clearly unprovoked and needless. The deceased was unarmed, and had made no threats or demonstrations against McCue. If what he said when he jumped up and ran out may be construed as idle bravado, it was neither justification nor excuse for the shooting. The pistol was loaded with three charges; it was within four feet, or six, as another witness stated, of Dieter's front side, and was discharged right at him, the ball penetrating the liver, a vital organ; and the prisoner raised it again to discharge it. What then must we say of an act so plainly directed at the life of another, so unprovoked and so barbarous, done with a deadly weapon, under no circumstances of rage or passion, produced by any reasonable

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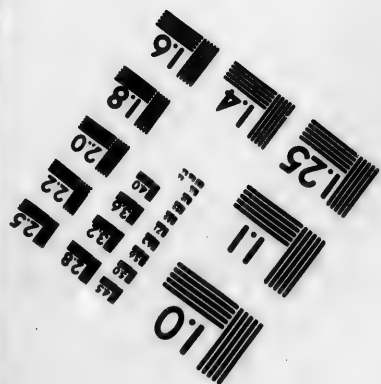
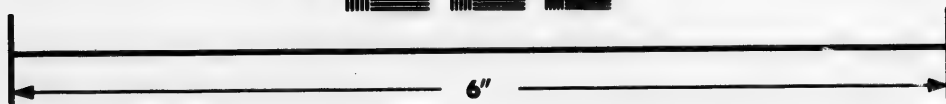
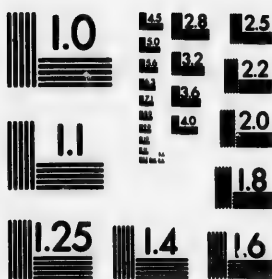
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cause of provocation. Clearly, there was sufficient time to think, deliberate and premeditate the act; as clearly the act was wilful and intentional, and the instrument used a deadly one, aimed at a vital part, where death was the probable and natural consequence of the act. What other intention, than an intention to kill, could be rationally inferred from the whole conduct of the prisoner? The motive may be obscure, indeed, may not be fathomed; but the act was there, plainly and fully obvious to the senses, and the effect of it clearly open to the prisoner's own mind. The ingredients of the crime of murder in the first degree were all there, however inscrutable may be the causes which moved the prisoner to commit the deed. When all the elements of the crime are present, and when there can be but one rational inference from the act itself, retribution cannot be avoided, because the motive lies hidden and unrevealed in the heart of him only who could disclose it.

It is true the time was short and the bullet swift, and God alone knows the motive; but the time was not too short, or the messenger of death too speedy, to take from the prisoner a consciousness of the true nature of his act. Of this, therefore, the jury must judge. They had ground for their verdict and their conclusion, that the prisoner intended to kill, and wilfully, and with deliberation and premeditation shot Dieter, was not irrational or plainly unfounded. The circumstances indicated "a wicked and depraved disposition, a heart fatally bent on mischief." The act was not more sudden than that of O'Hara, who killed Aitkins, and had less provocation than his. *Commonwealth v. O'Hara*, App. to 7 Smith's Laws, 694. Without adopting all the language of Chief Justice McKean in that case, I may use that of Judge Strong in *Cathcart v. The Commonwealth*, 1 Wright, 112: "If the killing was not accidental, then malice and a design to kill were to be presumed from the use of a deadly weapon; for the law adopts the common rational belief that a man intends the usual, immediate and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket ball through the body of his wife, and thus inflicts a mortal wound, has a heart fatally bent on mischief, and intends to kill." We are of opinion, therefore, that the elements of the crime found by the jury existed in the evidence, and so far there was no error.



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But there is one error for which the sentence of the court must be reversed. It does not appear from the record that the prisoner was asked before sentence, why sentence of death should not be pronounced upon him. This is a fatal error, and affects the merits of the case. It is necessary to ask the prisoner this, that he may have an opportunity, before the penalty of death be visited upon him, to plead in bar of the sentence any matter sufficient to prevent its execution. He may have found out some good reason why the trial was not legal, or he may plead a pardon, or supervening insanity. The question and the answer that he hath nothing to say other than that which he hath before said, or this in substance, must appear in the record before the sentence can be pronounced. *Prine v. The Commonwealth*, 6 Harris, 104; *Dougherty v. Commonwealth*, 19 P. F. Smith, 291. In this case the question may have been asked in fact, but it does not appear in the record, and as it is a matter of substance, we must treat it as not having been done. In all high felonies, and especially in cases of murder, the presiding judge should see that the record is made up properly, before the term is over.

The sentence will be reversed, in order that the case may be sent back, and an opportunity afforded to the prisoner to plead in bar of it, but this error will not reverse the trial and conviction. *Jewell v. Commonwealth*, 10 Harris, 94, 102.

The sentence of the court of oyer and terminer in this case is reversed, and it is ordered that the record be remitted to said court, with an order of *procedendo* to proceed and sentence the prisoner afresh, in due order and process of law.

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#### BERRY vs. COMMONWEALTH.

(10 Bush, Ky., 15.)

**HOMICIDE:** *Confessions — Erroneous charge — Dangerous weapons — Self-defense.*

A witness called to prove confession made by the respondent in a certain conversation, who testifies that "he could not remember all the conversations that took place; a great many things were said in the conversation that he did not remember," will not be allowed to testify to what he does remember.

A confession cannot be proved by a witness who does not remember the substance of all that was said in the same conversation.

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What is a dangerous weapon is a question of fact and not of law.

A charge which assumes facts as proven is erroneous.

*It seems* that if respondent agreed to fight and did fight the deceased, and while fighting, something occurred to create a reasonable belief in the respondent that he was then in danger of death or great bodily harm from deceased, and if respondent then on account of such fear killed deceased with a knife, it will be homicide in self-defense, and excusable.

PETERS, J. Appellant and Joseph Sampson, between whom angry words had passed, by mutual consent, engaged in a personal conflict, in which Sampson was stabbed and killed. Appellant was indicted for homicide, found guilty by a jury, and the court below, after overruling his motion for a new trial, pronounced judgment of death against him, and, for a reversal of that judgment, this appeal is prosecuted.

Thomas Wilson was introduced as a witness on the trial by the attorney for the commonwealth to prove confessions made by appellant in relation to the homicide, in a conversation with one Henry Martin, in the hearing of Wilson, while he was guarding appellant, prior to his examination before the court for inquiry.

On being interrogated by the attorney for appellant, Wilson stated that "he could not remember all the conversation that took place; a great many things were said in the conversation that he did not remember."

The attorney for the commonwealth then asked him "to state what he did remember that Berry said." To that appellant's attorney objected; but the court overruled his objection, and permitted Wilson to answer the question; to which ruling of the court, appellant by his attorney at the time excepted; and whether or not the court erred to the prejudice of appellant, in permitting the question to be answered by Wilson, will be first considered and disposed of.

The rule is well settled, that if the prosecutor attempts to avail himself of the confessions of the prisoner, he must take all that he said at the time on the subject. Greenleaf says, "In the proof of confessions, as in the case of admissions in civil actions, the whole of what the prisoner said on the subject at the time of making the confession should be taken together." This rule is the dictate of reason as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that



the entire proposition with all its limitations was contained in one sentence, or in any particular number of sentences, excluding all other parts of the conversation.

As in other cases, the meaning and intent of the parties are collected from the whole writing taken together, and all the instruments executed at one time by the parties and relating to the same matter are equally resorted to for that purpose. So here, if one part of the conversation is relied on as proof of a confession of crime, the prisoner has a right to lay before the court the whole of what was said in that conversation; not being confined to so much only as is explanatory of the part already proved against him, but being permitted to give evidence of all that was said upon that occasion relative to the subject matter in issue. 1 Greenl. Ev., sec. 218.

If the witness called to prove the confessions of the prisoner says he does not remember all the conversation, and that a great many things were said in the conversation which he did not remember, and is still permitted to testify without even stating that he remembers the substance of *all* that was said at the time on the subject, it is obvious that the rule is violated, and the humane part of it disregarded.

The court below therefore erred in admitting Wilson to testify as to the confessions of the prisoner, and for the same reasons, the evidence of Henry Martin as to confessions was incompetent.

We do not understand the order of the court in reference to the challenge of jurors as the attorney for appellant seems to understand it. That order reads as follows: "The following additional jurors were taken, to wit: John Miller, Thomas Ballew, Joseph Turner, Fleming Shelton, Madison Shelton, Eli Smith & John Woodson, and James Taulbee were challenged by the commonwealth."

Some jurors included and named in this order were certainly taken, because it is so stated in express terms; who or which of them were taken on the panel must be determined by the grammatical and rational interpretation of the whole order.

Let the words of the sentence be slightly transposed so as to read thus: "The following additional jurors, to wit, John Miller, Thomas Ballew, Joseph Turner, Fleming Shelton, Madison Shelton, Eli Smith, were taken; and John Woodson and James Taulbee were challenged by the commonwealth." This sentence con-

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tains every word that is in the order and not one more; the words composing each are identically the same, and every word has its appropriate and ordinary meaning, and everyone of common understanding who should read it would know that the six persons first named in the order were taken on the jury, and the two last named were challenged. Whereas, if the construction contended for be allowed, the two words "were taken" must be wholly rejected, as no meaning could be given to them if the attorney's interpretation prevails. The character "&," representing the conjoining word "and," immediately following the name Eli Smith, denotes that something is to be added to what preceded; which addition may be "and John Woodson and James Taulbee were challenged," etc., which is consistent with both the rules of grammar and the propriety of speech.

To the first instruction, given on motion of the attorney for the commonwealth, there seems to be no available objection; but the second is erroneous and prejudicial to appellant, for it not only assumes as proved that the knife was a dangerous weapon and was concealed from the deceased, but it confines the apprehension of the danger of death or great bodily harm on the part of appellant to the time when he agreed to fight the deceased, instead of also extending it to the time when the stabbing was done.

Appellant may have had no apprehension of serious injury from deceased when he agreed to fight him; but during the fight, something may have occurred to create a reasonable belief that he was *then* in danger of death or great bodily harm from deceased, and on account of the fear thus apprehended, used his knife.

The third instruction, like the second, excludes from the jury the consideration of the fact whether *at the time* appellant used his knife he had reasonable grounds to believe, and did believe, that he was in danger of death or great bodily harm from deceased, and assumes that the knife was a dangerous weapon, and appellant concealed it from deceased, instead of submitting the facts to the jury to be determined by them from the evidence.

Instruction No. 4 should have been qualified by the addition of the following, after the words stabbed and killed the deceased: "Unless the defendant had reasonable grounds to believe, and did believe at the time, that he was in danger of losing his life

or suffering great bodily harm from the deceased. And instruction No. 5 should have been qualified in the same way. Instructions Nos. 6, 7 and 8 seem to be unobjectionable.

All those asked for by appellant were given except No. 3, and that we think was properly refused for several reasons. In the first sentence of the instruction, the jury were authorized to acquit him if they believed, from the evidence, that defendant was under bonds to keep the peace, and deceased knew that fact, and brought on the difficulty for the purpose of killing him or doing him great bodily harm, although there was not at the time any *real* or apparent danger to defendant of death or great bodily harm, making the homicide excusable if the jury believed, from the evidence, that the deceased brought on the fight with the intention of killing defendant or doing him great bodily harm, although at the time he gave the fatal stab there was no reasonable ground to believe, and although he might not have believed, that he was in danger of being killed or of suffering great bodily harm. And by another sentence in said instruction, they were authorized to acquit defendant if, from mere threats before and at the time of the fight, and from other circumstances surrounding the parties, he had reasonable ground to believe, and did believe that he was in continued *danger*, not that he was in danger of losing his life and suffering great bodily harm, but any danger, even slight personal injury, civil or then or at any future time. This was not the law of the case, and the court below did not err in refusing to give it.

But for the reasons before stated, the judgment is reversed, and the cause is remanded, with directions to award to appellant a new trial, and for further proceedings consistent herewith; which is ordered to be certified to the court below.

*Judgment reversed.*

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#### WELLAR *vs.* PEOPLE.

(30 Mich., 16.)

**HOMICIDE: Manslaughter — Evidence — Practice — Duty of prosecution in calling witnesses.**

In a prosecution for homicide, where it appears that no weapon was used, but that death resulted from a blow or a kick not likely to cause death, the offense is manslaughter and not murder, although the assault be unlawful

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and malicious, unless the respondent did the act with intent to cause death or grievous bodily harm, or to perpetrate a felony, or some act involving all the wickedness of a felony.

On a trial for homicide, it is proper to prove the relations in which the deceased and accused lived with one another.

On a trial for homicide, it is proper to prove the respective strength of the parties, but not by evidence of specific acts.

In cases of homicide, it is the duty of the prosecution, ordinarily, to call and examine, on behalf of the people, all those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, whether such witnesses be favorable or unfavorable to the prosecution.

#### ERROR to *Saginaw* Circuit.

*William H. Sweet* and *William A. Clark*, for plaintiff in error.  
*Isaac Marston*, Attorney General, for the people.

CAMPBELL, J. Plaintiff in error was convicted of the murder of *Margaret Campbell*, by personal violence committed on July 25, 1873. They had lived together for several months, and on the occasion of her death, she had been out on an errand of her own in the neighborhood, and on coming back into the house, entered the front door of the bar-room, and fell, or was knocked down upon the floor. While on the floor, there was evidence tending to show that *Wellar* told her to get up, and kicked her, and that he drew her from the bar-room, through the dining-room into a bed-room, where he left her, and where she afterwards died. The injury of which she died was inflicted on her left temple, and the evidence does not seem to have been clear how she received it, or at what specific time. It was claimed by the prosecution to have been inflicted by a blow when she first came in, and if not, then by a blow or kick afterwards. All of the testimony is not returned, and the principal questions arise out of rulings which depend on the assumption that the jury might find that her death was caused by some violent act of *Wellar's*; which they must have done to convict him. There can be no question but that, if she so came to her death, he was guilty of either murder or manslaughter. The complaint made against the charge is that a theory was put to the jury, on which they were instructed to find as murder what would, or at least might, be manslaughter.

There was no proof tending to show the use of any weapon, and, if we may judge from the charge, the prosecution claimed

the fatal injury came from a blow of *Wellar's* fist, given as she entered the house. The judge seems to have regarded it as shown by a preponderance of proof, that the injury was invisible when she was in the bar-room, and that the principal dispute was as to how it was caused, whether by a blow, or kick, or by accident. It also appears that, if inflicted in that room, it did not produce insensibility at the time, if inflicted before the prisoner dragged her into the bed-room. It does not appear from the case at what hour she died.

It may be proper to remark that, while it is not desirable to introduce all the testimony into a bill of exceptions, in a criminal case, it is important to indicate in some way the whole chain of facts which the evidence tends to prove. Without this, we cannot fully appreciate the relations of many of the rulings, or know what instructions may be necessary to be sent down to the court below. The bill before us is full upon some things, but leaves out some things which it would have been better to include.

Upon any of the theories presented, there is no difficulty in seeing that if *Wellar* killed the deceased, and if he distinctly intended to kill her, his crime was murder. It is not claimed on his behalf that there was any proof which could reduce the act to manslaughter, if there was a specific design to take life. Upon this the charge was full and pointed, and is not complained of. There was no claim that he had been provoked in such a way or to such an extent as to mitigate the intentional slaying to anything below one of the degrees of murder.

But it is claimed that although the injury given was fatal, yet, if not intended to produce any such results, it was of such a character that the jury might, and probably should, have considered it as resting on different grounds from those which determine responsibility for acts done with deadly weapons used in a way likely to produce dangerous consequences. But the charge of the court did not permit them to take that view.

It will be found, by careful inspection of the charge, that the court specifically instructed the jury, that if *Wellar* committed the homicide at all, it would be murder, and not manslaughter, unless it was committed under such extreme provocation as is recognized in the authorities as sufficient to reduce intentional and voluntary homicide, committed with a deadly weapon, to

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that degree of crime. And in this connection, the charge further given that, if the intent of the respondent was to commit bodily harm, he was responsible for the result, because he acted wilfully and maliciously in doing the injury, necessarily led to a conviction of murder, because there was no pretense of any provocation of that kind.

Manslaughter is a very serious felony, and may be punished severely. The discretionary punishment for murder in the second degree comes considerably short of the maximum punishment for manslaughter. But the distinction is a vital one, resting chiefly on the greater disregard of human life shown in the higher crime. And in determining whether a person who has killed another, without meaning to kill him, is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended must usually be of controlling importance.

It is not necessary in all cases that one held for murder must have intended to take the life of the person he slays by his wrongful act. It is not always that he must have intended a personal injury to such person. But it is necessary that the intent with which he acted shall be equivalent in legal character to a criminal purpose aimed against life. Generally the intent must have been to commit either a specific felony, or at least an act involving all the wickedness of a felony. And if the intent be directly to produce a bodily injury, it must be such an injury as may be expected to involve serious consequences, either periling life or leading to great bodily harm. There is no rule recognized as authority which will allow a conviction of murder where a fatal result was not intended, unless the injury intended was one of a very serious character, which might naturally and commonly involve loss of life, or grievous mischief. Every assault involves bodily harm. But any doctrine which would hold every assailant as a murderer, where death follows his act, would be barbarous and unreasonable.

The language used in most of the statutes on felonious assaults is, an intent to do "grievous bodily harm. Carr. Sup., p. 237. And even such an assault, though "unlawfully and maliciously" made, is recognized as one where, if death followed, the result would not necessarily have been murder. Id. Our own statutes have made no provision for rendering an assault feloni-



ous, unless committed with a dangerous weapon, or with an intent to commit some felony. Comp. L., ch. 244.

In general, it has been held that where the assault is not committed with a deadly weapon, the intent must be clearly felonious, or the death will subject only to the charge of manslaughter. The presumption arising from the character of the instrument of violence is not conclusive in either way, but where such weapons are used as do not usually kill, the deadly intent ought to be left in no doubt. There are cases on record where death by beating and kicking has been held to warrant a verdict of murder, the murderous intent being found. But where there was no such intent, the ruling has been otherwise. In *State v. McNab*, 20 N. H., 160, it is held that unless the unlawful act of violence intended was felonious, the offense was manslaughter. The same doctrine is laid down in *State v. Smith*, 32 Me., 369. That is the statutory rule in New York and in some other states.

The wilful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent. See 2 Bish. Cr. L., §§ 680, 681. But where the weapon or implement used is not likely to kill or to maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose. See *Turner's Case*, 1 Raym., 144, where the servant was hit on the head with a clog; *State v. Jarrott*, 1 Ired., 76, where the blow was with a hickory stick; *Holly v. State*, 10 Humph., 141, where a boy threw a stone; *Rex v. Kelly*, 1 Moo., C. C., 113, where it was uncertain whether a person was killed by a blow with the fist, which threw him on a brick, or by a blow from a brick, and the court held it a clear case of manslaughter. In *Darry v. People*, 10 N. Y., 120, the distinctions are mentioned and relied upon, and in the opinion of PARKER, J., there are some remarks very applicable. In the case of *Com. v. Webster*, 5 Cush., 295, the rulings of which have been regarded as going beyond law in severity, this question is dealt with in accordance with the same views, and quotations are given from East to the same purport.

The case of death in a prize fight is one of the commonest illustrations of manslaughter, where there is a deliberate arrangement to fight, and where great violence is always to be expected from the strength of the parties and the purpose of fighting till

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one or the other is unable to continue the contest. A duel with deadly weapons renders every killing murder; but a fight without weapons, or with weapons not deadly, leads only to manslaughter, unless death is intended. 1 East P. C., 270; *Murphy's Case*, 6 C. & P., 103; *Hargrave's Case* 5 id., 170.

The case of *Commonwealth v. Fox*, 7 Gray, 585, is one resembling the present in several respects, in which the offense was held manslaughter.

The jury were sufficiently and rightly charged upon the extent of the respondent's liability for any intended killing. And if respondent wilfully and violently kicked the deceased in such a way as he must have known would endanger her life, and her life was destroyed in that way, an actual intention of killing would not be necessary, as in such case the death would have been a result he might fairly be held to regard as likely. But it was certainly open to him to claim that, whatever may have been the cause of death, he did nothing which was designed to produce any serious or fatal mischief, and that the injury from which the deceased came to her death was not intentionally aimed at a vital spot, or one where the consequences would be probably or manifestly dangerous. We have no right to say that there was no room for a verdict of manslaughter, and the effect of the charge was to deny this.

Most of the other questions are of such nature that, if arising on another trial, they will be presented in a more guarded form. We have no doubt it is proper to show the previous relations of Wellar and the deceased, and that they may be of more or less importance in explaining conduct and motives. We are also inclined to think it would not be incompetent to show the physical strength of the respective parties. It is objectionable, however, to prove these things by evidence of specific acts, especially where inferences might be drawn unfavorable to the prisoner's character, which would not be relevant to the charge. These inquiries should be general, and not leading, and should not, where it can be avoided, introduce irrelevant matter.

We also think it was not correct practice to compel the defense, instead of the prosecution, to call the witness Maladay. It appeared that he was one of two persons present at the occurrence for which Wellar was on trial, and it further appeared that his name was endorsed on the information as one of the people's

witnesses, so that he was not unknown to the prosecution. It devolves on the prosecutor in a case of homicide, to connect the prisoner with the injury which is claimed to have been the cause of death, and to give all the testimony in his power going to the proof of the *corpus delicti*. The fact that the name of a witness is endorsed on the information does not of itself involve any necessary obligation to do any more than have the witness in court ready to be examined. *Rex v. Simonds*, 1 C. & P., 84; *Rex v. Beezley*, 4 id., 220; *Reg. v. Bull*, 9 id., 22; *Reg. v. Bodle*, 6 id., 186; *Reg. v. Vincent*, 9 id., 91; *Rex v. Harris*, 7 id., 581. But in cases of homicide, and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called, unless, possibly, where too numerous. If there is any other admissible reason, none has yet been passed upon, and none has been presented which could apply to the case before us. If some one were to come forward and assert his presence when he had not been seen or noticed by others, there might be room for questioning his position. But where there is no doubt or dispute as to the fact of presence, no such question can arise, and the only objection then will be, that he may not be favorable to the prosecution. But this is no answer, any more than it would be if a subscribing witness stood in a similar position. As explained in *Hurd v. People*, 25 Mich., 406, and in the English cases there referred to, a public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony. The fact that he is compelled to call these witnesses, when he may not always find them disposed to frankness, entitles him, when it appears necessary, to press them with searching questions. *Reg. v. Ball*, 8 C. & P., 745; *Reg. v. Chapman*, 8 id., 558. By this means, and by laying all the facts before the jury, they are quite as likely to get at the truth as if he were allowed to impeach the witnesses who disappointed him. Any intelligent jury will readily discover, whether a witness whom the prosecutor has been compelled to call is fair or adverse, and can make all proper allowance for bias, or any other influence which may affect his credit. If there is but a single eye witness, he could not be impeached, and yet the danger of falsehood is quite as great, and the chances of its

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correction much less than where there are two, and both are called. And if such a witness need not be called by the prosecution, the defense cannot impeach him, and must either call him, and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts.

The judgment must be reversed, and a new trial granted. The respondent to be remanded to the custody of the sheriff of Saginaw county.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, C. J., did not sit in this case.

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LYNCH vs. COMMONWEALTH.

(77 Pa. St., 205.)

*HOMICIDE: Provocation — Manslaughter — Insanity — Summoning jury.*

Any error in this case in the summoning of the jury held cured by the statute of amendment.

Where the prisoner, who lived with his sister, a married woman, went home late at night and, hearing a noise in his sister's room, became suspicious that something wrong was going on; and, after listening awhile, becoming convinced that his suspicions were well founded, took out his knife and opened it, broke open the door, and found his sister in the room in her night dress, and deceased in the bed, and, being greatly enraged, killed the adulterer, it was *held*, as a matter of law, that this was not such provocation as reduced the killing to manslaughter.

*It seems* that seeing a married sister in the act of adultery is not such provocation as to reduce the killing of the adulterer to manslaughter.

Where insanity is relied on as a defense to a charge of murder, the defendant must satisfy the jury that he was insane at the time of the killing. A doubt as to his sanity is not sufficient.

READ, C. J. By the second section of the Act of the 10th of April, 1867, it is made the duty of the jury commissioners, president judges, or additional judges of their respective districts, to meet at the seat of justice of the county at least thirty

days before the first term of the court of common pleas, in every year, and select the jurors agreeably to the provisions of said section, who are to serve as jurors in the several courts of such county during that year. The names of the persons so selected shall be placed by them, or a majority of them, in the proper wheel, in the mode and manner directed by law. The third section describes how the jury commissioners and sheriff shall draw from the proper jury wheel the different panels of jurors.

The precepts in this case, and the venires for the grand and petit or traverse jurors, were issued on the 2d of April, 1872, and on the 15th of the same month, were returned in due form by the sheriff and jury commissioners, by whom the names of the grand and traverse jurors were drawn from the jury wheel in due form of law. The error assigned in both cases is the same; the clerical error of using the words "commissioners of said county," instead of "jury commissioners." Everything else in the whole proceeding was right, and the alleged error was not discovered until several months after the trial.

These alleged defects or errors are cured by the 53d section of the Criminal Procedure Act of the 31st of March, 1860, which enacts that "no verdict in any criminal court shall be set aside, nor shall any judgment be arrested or reversed, nor sentence delayed for any defect or error in the *præcipe* issued from any court, or the venire issued for the summoning and returning of jurors, or any defect or error in drawing or returning any juror or panel of jurors, but a trial or agreement to try on the merits, or pleading guilty on the general issue in any case, shall be a waiver of all error and defects in or relative or appertaining to the said precept, venire, drawing, or summoning and returning of jurors."

Ambrose E. Lynch was indicted for the murder of William Hadfield, on the night of the 12th of June, 1872, by stabbing him with a knife, and was tried in July, of the same year, and convicted of murder in the first degree. The circumstances attending the murder are few, and may be told very briefly. The sister of the plaintiff in error lived in a small house in Allegheny City, of whom the defendant Lynch was a guest. Late at night Lynch came in by a side door, and was in only a few minutes when he heard a noise; listened, and heard a creaking;

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took out his knife and opened it; he put his shoulder to the door and shoved it; it did not go in the first time; put his shoulder to it the second time and it went in, and he saw his sister getting out of bed. He struck the deceased twice in the back, in the bed, with his knife, and a third time, when on the floor, in the breast. This last was the mortal wound, of which Hadfield died between twelve and one o'clock the same night. We have omitted the profane and blasphemous language made use of by the defendant Lynch.

We have read over, with great care, the very able charge of Judge STARRETT, who explains very fully to the jury the different degrees of felonious homicide, murder in the first degree, murder in the second degree, voluntary and involuntary manslaughter.

This brings us naturally to a part of the charge following this explanation, which is assigned as the fifth error. It is evident, from the language used, that the prisoner's counsel was endeavoring to reduce the crime to that of voluntary manslaughter, with which the court certainly did not agree. "It is claimed," said the learned judge, "by the prisoner in this case, that on going to his sister's house at a late hour in the night, he heard a noise in her room; suspected that something wrong was going on there; listened awhile, and becoming convinced that his suspicions were well founded, he took out his knife and opened it, put his shoulder to the door, forced it in, and found his sister there in her night dress, and the deceased in the room with her; that he was greatly excited and enraged, and in the heat of passion thus generated, he stabbed the deceased twice in the back and once in the breast. Assuming all this to be true, does it amount in law to sufficient cause of provocation to reduce the killing to manslaughter? We are of opinion that it does not; that there is nothing in these circumstances, as they are claimed to exist, by the prisoner, that would reduce the grade of the offense to voluntary manslaughter. It is the duty of the court to say, as a matter of law, what fact or facts will amount to sufficient legal provocation if they are found by the jury. In other words, it is for the jury to find what the facts are, and for the court to say what effect shall be given them. Assuming, then, the facts to be as claimed by the prisoner, in this regard, we say that they do not amount to sufficient or legal provocation, such

as would reduce the grade of a felonious homicide to manslaughter.

In all this there was clearly no error. The third error assigned is, to the answer of the court to the defendant's first point, which was, "that if on the night of the killing, defendant found, or supposed he found, the deceased in bed with defendant's married sister, and was thereby so much excited as for the time to overwhelm his reason, conscience and judgment, and cause him to act from an uncontrollable and irresistible impulse, the law will not hold him responsible."

This seems very vague and uncertain, but the court say, "as the point seems to amount to the proposition, that if the prisoner was temporarily insane at the time he did the cutting, he is not guilty of any legal offense, it is affirmed as an abstract principle of law. If the defendant was actually insane at the time, this of course relieves him from criminal responsibility, from whatever cause the insanity arose.

But the jury must not confound anger or wrath with actual insanity; because, however absurd or unreasonable a man may act when exceedingly angry, either with or without cause, if his reason is not actually dethroned, it is no legal excuse for violation of law." There is no error in this answer.

The fourth error assigned is to the answer to the defendant's second point, which is: "That if the jury have a reasonable doubt as to the condition of defendant's mind, at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict."

As to the second point, the court said, "the law of the state is, that when the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify the jury in acquitting upon that ground. The law presumes sanity when an act is done, if no insanity is shown by the evidence, and when it appears a man was sane shortly preceding the act, and shortly after, the presumption of sanity exists at the time of the act, and no jury have a right to assume otherwise, unless evidence in connection with the act convinces them that the defendant was actually insane at the moment the act was committed. This point is refused, and rightly, and it needs no ar-

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argument to show that the court were entirely correct in their ruling and answer.

The sixth error is not sustained, for it is clear the ingredients necessary to constitute murder in the first degree were proved to exist, and in determining this to be the case, we have reviewed both the law and the evidence.

Sentence affirmed and record remitted.

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RAFFERTY vs. PEOPLE.

(69 Ill., 111.)

HOMICIDE: *Arrest — Warrant issued in blank.*

On a trial for murder, where evidence was given by the respondents that the homicide was committed by the respondent in resisting an utterly illegal and unjustifiable arrest, attempted by the deceased who was a policeman, it was held that the offense was no more than manslaughter, and that the court erred in excluding this evidence from the consideration of the jury.

A warrant signed by a magistrate in blank and afterwards filled up by a police sergeant with whom it had been left has, although regular on its face, no legal force or validity whatever, but is an absolute nullity; and if an officer is killed in attempting to make any arrest under it, the offense is but manslaughter.

SCOTT, J. dissenting.

McALLISTER, J. The plaintiff in error having been found guilty upon an indictment, for the murder of one Patrick O'Meara, and sentenced to suffer the penalty of death, has caused the evidence, together with the rulings of the court and exceptions taken, to be preserved in a bill of exceptions, and brought the record to this court for review, upon writ of error.

Various errors have been assigned, among which is the exclusion of proper evidence, and overruling his motion for a new trial.

We propose to consider but one question presented, and that is one vitally affecting the merits of the case, and which we cannot disregard without overriding a plain and well settled rule of law, based upon a foundation no less solid than the natural rights of personal liberty and security — rights held sacred by the common law, and recognized and protected by constitutional enactments.



The record contains evidence tending to show that the homicide was committed by the prisoner in resisting the deceased, who was a policeman of the city of Chicago, whilst engaged in connection with another policeman, whom he was aiding, in the act of committing an illegal and wholly unjustifiable invasion of plaintiff's liberty, by attempting to seize his person and take him off to prison, without any authority in law so to do.

The circumstances, which the evidence tends to prove, were briefly these: At a little after midnight of the night of the 4th, and in the early morning of the 5th of August, 1872, the prisoner was sitting quietly and peaceably by a table in a saloon, when O'Meara, the deceased, and another policeman of the name of Scanlan, came in. O'Meara immediately pointed the prisoner out to Scanlan. The prisoner upon seeing O'Meara, addressed him in a friendly manner, asking him to take something to drink, or a cigar, which was declined. Scanlan then went directly up to the prisoner, tapped him on the shoulder, and told him he had a warrant for him. The prisoner demanded the reading of the warrant, which was done, and the prisoner apparently submitted to the arrest; but immediately threatened to shoot the first man who should lay a hand upon him. O'Meara, who came with a slung shot hung to his wrist, stationed himself at the outer door to prevent prisoner's escape, while Scanlan kept himself in position to guard a back door.

All this occurred in a brief space of time; and while O'Meara, with a slungshot suspended from his wrist was thus guarding the door which led into the street, the prisoner shot him with a pistol, inflicting a mortal wound. There is not the slightest pretense in the case that the prisoner had been accused or suspected of having committed any felony, or that he, at any time, was in the act of committing a misdemeanor, or even any violation of a city ordinance. The facts appearing from the tendency of the evidence are, that the homicide was committed while the deceased was assisting in the arrest of the prisoner under the circumstances stated. No attempt was made by the state's attorney, on the trial, to show that the prisoner had been charged with the commission of any felony, or to prove that either of the policemen in question had in their possession, at the time, any lawful writ or warrant authorizing the prisoner's arrest. But the counsel for the prisoner caused to be produced and

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identified the supposed warrant which the policeman had, and upon which the arrest was made, and established, by undisputed evidence, that police sergeant Hood had in his drawer a number of blank summonses and warrants, which had been signed by police magistrate Banyon, and which the sergeant had been accustomed to fill up in the absence of the magistrate, and use, from time to time, as exigencies might require. That from these blanks he, on Sunday, August 4, 1872, filled up the one in question, putting the prisoner's name into it, in the absence of the magistrate; and to avoid the appearance of having been issued on Sunday, it was dated the 5th of August. This paper was delivered to Scanlan, and he and O'Meara proceeded, as the evidence clearly shows, to hunt for the prisoner all that Sunday night, with the intention of arresting him on that pretended process, as soon as midnight was passed, if they could find him. When the supposed warrant was introduced in evidence, and the testimony showing how it was brought into existence was given, the court, upon the motion of the state's attorney, excluded the warrant and all evidence relating to it, from the jury, as incompetent; to which the prisoner's counsel excepted.

The supposed warrant, as filled out by the sergeant, was directed to any constable or policeman of the city of Chicago, commanding them to take the body of one Christopher Rafferty, and bring him forthwith before the magistrate, unless special bail should be entered; and if such bail should be entered, then to command Rafferty to appear before such magistrate at eight o'clock A. M., on the 10th day of August, 1872, at his office, etc., "to answer the complaint of the city of Chicago in a plea of debt for a failure to pay said city a certain demand, not exceeding one hundred dollars, for a violation of an ordinance of said city, entitled an ordinance for revising and consolidating the general ordinances of the city of Chicago, passed October 23, 1865, to wit: For committing a breach of the peace, and making an improper noise and disturbance in said city, or for using threatening or abusive language towards another person, tending to a breach of the peace, in violation of section 29 of chapter 25 of said ordinance, and hereof make due return as the law directs.

"Given under my hand and seal this 5th day of August, 1872.

"[SEAL.]

A. H. BANYON, *Justice of the Peace.*"

The sixth section of chapter eleven of the charter of Chicago (Gary's Laws, 114) declares as follows: "In all prosecutions for any violation of any ordinance, by-law, police or other regulation, the first process shall be a summons, *unless oath or affirmation be made for a warrant, as in other cases.*" And by section 1 of chapter 33 of ordinances (Gary's Laws, 306), it is provided that the several members of the police force "shall have power to arrest all persons in the city *found in the act of violating any law or ordinance, or aiding and abetting in any such violation.*"

It is clear, beyond doubt, that there was not the slightest authority in Scanlan and the deceased to arrest the prisoner, unless it can be found in the supposed writ or warrant, which the court excluded. And it cannot be denied that the legality of the arrest of the prisoner was a material question in determining the character of the homicide; for it is a well established rule, that where persons have authority to arrest, and are resisted and killed in the proper exercise of such authority, the homicide is murder in all who take part in such resistance. And, on the other hand, it is equally well settled, that where the arrest is illegal, the offense is reduced to manslaughter. Foster, 270; Hale's P. C., 465.

If, therefore, it be conceded that the warrant was legal, then, inasmuch as the policeman had no authority to arrest the prisoner without it, the production of the warrant in evidence was necessary in order to a conviction for murder. But if it was, to all intents and purposes, illegal and void, then the supposed warrant and the testimony showing its nullity, were competent and proper for the accused, in order to show that the character of the homicide was manslaughter and not murder.

We have seen that, by the express provisions of the charter of Chicago, no process of the kind in question could have been lawfully issued by the magistrate himself, without an oath or affirmation made for the warrant as in other cases; and yet, we find blanks, signed by the magistrate, put into the hands of a sergeant of police, filled out by him and used as legal process with which to arrest the citizens of the state, with full knowledge, as we must presume, on the part of the magistrate and sergeant, that they were so put into use, without the required oath, and in violation of law. Such conduct is reprehensible in

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the highest degree, and it is a matter of no astonishment that such tragical results followed. But when so filled out, the paper was an absolute nullity. It did not issue in the ordinary course of justice, from a court or magistrate. It did not issue from the magistrate at all; because, when it went from his control, it contained no authority, express or implied, to arrest and imprison Rafferty or anybody else.

The law on this subject is clear and explicit. "But if the process is defective in the frame of it, as, if there be a mistake in the name of the person on whom it is to be executed, *or if the name of such person*, or of the officer, *be inserted without authority*, or after the issuing of the process, or if the officer exceeded his authority, the killing of the officer in such case by the party would be manslaughter only." 2 Arch. Cr. Pr. and Pl., 242.

"It is a general rule that when persons have authority to arrest or imprison, and, using the proper means for that purpose, are resisted in so doing and killed, it will be murder in all who take part in such resistance." Foster, 270. But three things are to be attended to in matters of this kind; the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for, if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or if issued *with a blank in it*, and the *blank afterwards filled up*, or if issued with an insufficient description of the defendant, or against the wrong person, or out of the district in which alone it could be lawfully executed; or if a private person interfere and act in a case where he has no authority by law to do so, or if the defendant have no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted or killed, the killing will be manslaughter only." 1 Hale's P. C., 465. See also *Housin v. Barrow*, 6 Durnf. and East, 122; *Re v. Hood*, 1 Moo. C. C.; 1 East P. C., 110, 111.

Roscoe, in his work on Criminal Evidence, 698, says: "If the process be defective in the frame of it, as, if there be a mistake in the name or addition of the party, or if *the name of the party*, or of the officer, *be inserted without authority*, and *after the issuing of the process*, and the officer, in attempting to execute it, be killed, this is only manslaughter in the person whose liberty is invaded."

Such, undoubtedly, is the law, and the evidence excluded would bring the prisoner's case fully within it. His name was inserted in the warrant by the sergeant of police, after it had been delivered to him by the magistrate, and consequently without authority. These facts, if found by the jury, should determine the character of the homicide to be manslaughter, unless the proof showed express malice towards the deceased. 3 Greenl. Ev., p. 106, sec. 123; *Roberts v. The State*, 14 Mo., 138. No authority has been cited, and we hazard nothing in saying that none can be found which would justify the exclusion of this evidence under the circumstances of this case. The accused had the legal right to have it go to the jury, because it was material in determining the character of the homicide. This was a question exclusively for the jury, and as to which we do not wish to be understood as expressing any opinion. For this error the judgment will be reversed and the cause remanded.

*Judgment reversed.*

Scott, J. I cannot yield my assent to all the reasoning of the majority of the court.

It seems to me the rule announced may be liable to an improper construction. An officer is not bound, at his peril, to judge whether the writ he is about to serve is, in fact, legal, or whether the magistrate, who issued it, was guilty of misconduct in not complying with all the provisions of the law. It would be requiring too much of him to so hold. If the opinion of the court can be construed into holding a contrary doctrine, I do not concur in it. The general rule is, the officer may rightfully execute, or assist in the execution of any process, regular on its face, without putting his life in jeopardy at the hands of offenders against the law. Any other rule would be unreasonable.

There can be no question, the law is, if a party in resisting an unlawful arrest commits a homicide, the crime will be manslaughter and not murder. It is always, however, a question of fact, to be found from the evidence.

In this view of the law, it would have been proper, no doubt, for the court to have permitted the jury to consider the evidence tendered, however slight it might be, on the question whether the homicide was in fact committed in resisting an unlawful arrest.

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There is no pretense the deceased was, himself, about to serve any process, and it may be the jury will find that he was not even assisting Scanlan to arrest the accused when the fatal wound was inflicted. If so, the evidence will be immaterial.

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COFFMAN vs. COMMONWEALTH.

(10 Bush, Ky., 495.)

HOMICIDE: *Confessions — Erroneous charges — Manslaughter — Self-defense — Death from surgical operation.*

Where the prosecution have proved declarations of the respondent relative to the homicide by a witness who states that he did not hear all that respondent said at the time, the respondent has a right to prove by other witnesses who were present all that he said at the time tending to exonerate himself. A charge which enumerates the facts which the evidence tends to prove is erroneous. The charge should point out the facts necessary to be found, and then leave to the counsel to argue and the jury to determine whether or not the evidence proves these facts.

It is not necessary that respondent should be without fault in order to reduce the killing of deceased by a blow of the fist in a sudden quarrel to manslaughter.

In order to excuse a homicide on the ground of self-defense, it is not necessary that there should be immediately impending danger. If the respondent believed, and had reasonable ground to believe, that there was immediate impending danger, and he had no other apparent and safe means of escape, he had a right to strike, although in fact there was no danger.

In cases of homicide, if an operation is performed on the deceased, such as an ordinarily prudent and skilful surgeon to be procured in the neighborhood would deem necessary, and such operation is performed with ordinary skill, the respondent is responsible for the death, although the operation and not the wound made by him caused the death.

In cases of homicide, if an operation is performed on the deceased, such as would not be deemed necessary by such ordinarily prudent and skilful surgeon as can be procured in the neighborhood, or if it would have been deemed necessary but was not performed with ordinary skill, and death results from the operation and not from the injuries inflicted by the respondent, the respondent ought to be acquitted, even though the injuries inflicted by him might eventually have proved fatal.

COFER, J. Having been found guilty of manslaughter, and sentenced to confinement in the penitentiary for eight years, for killing John Harrison, the appellant seeks a reversal of that judgment on two grounds: *first*, that the court erred in excluding important legal evidence offered by him; and *second*, that the court erred to his prejudice in instructing the jury.



1. A witness for the commonwealth proved declarations made by appellant relative to the homicide, but stated that he did not hear all that the appellant said at the time; and appellant offered to prove by other witnesses who were present at the time and heard the words proved by the commonwealth's witness, other statements made in the same conversation, tending to make out the defense. This was objected to and excluded; but while we regard the evidence as competent, if the declarations testified to by the witness for the appellee were introduced by the commonwealth, yet as it does not appear who brought out the evidence of the declarations, we cannot decide that the court erred in excluding the evidence offered by appellant.

2. The instructions given are nearly all objectionable because of an attempt made to enumerate the collateral facts which the evidence tended to prove, instead of being hypothecated upon the facts necessary to constitute guilt or to make out a defense. The objection to an attempt to enumerate the facts which the evidence tends to prove, instead of basing the instructions on the facts necessary to be found by the jury, is that it unnecessarily lengthens the instructions, and is on that account calculated to confuse and mislead the jury; and it is liable to the further objection that by giving prominence to the facts enumerated, other facts not recited seem to be subordinated, and may on that account be overlooked by the jury; or they may conclude that as the court has referred to a part and omitted to mention other facts which the evidence tends to prove, such facts were deemed by the court of no importance. Instructions ought, therefore, as a general rule, to be based only upon such facts as must be found by the jury in order to establish guilt or to make out a defense, thus leaving to counsel to argue the evidence tending to establish the essential facts, and to the jury to decide how far the evidence establishes them.

The jury were told in substance, in the second instruction, that if the appellant and the deceased had a sudden quarrel, and *without fault on his part*, appellant in sudden heat and passion, and not to defend himself from *immediate, impending and threatened* danger, struck the deceased and knocked him down, and he was injured by the fall and died from the injury, they should find the appellant guilty of manslaughter.

This instruction does not correctly lay down the law of self-

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defense, and is also objectionable on the ground that it required that the appellant should have been *without fault* before the heat of passion could reduce a killing done by a blow of the fist in a sudden quarrel from murder to manslaughter. It is not necessary, in order to excuse a homicide on the ground of self-defense, that there should be actual, *immediate, impending* danger. If the appellant believed, and had reasonable ground to believe, there was immediate impending danger, and he had no other apparent and safe means of escape, he had a right to strike, although the supposed danger may not in fact have existed.

In the third instruction, the jury were told that if an altercation took place between the parties in a grocery, where they seem to have met, and the deceased invited the appellant to go with him into the street and settle the matter, and the appellant voluntarily went with him to settle the matter, and after getting into the street, angry words were used by both, and both were ready and willing to fight, and they did fight, and appellant wounded the deceased, and he died from the effect of the wounds, appellant was guilty of manslaughter. This instruction was erroneous. The appellant may have gone out for an amicable settlement and with no hostile intention; and if he did so, and a quarrel arose and a fight ensued, his right of self-defense was unaffected by the fact that he had gone voluntarily.

The qualification of the fifth instruction was also erroneous. In it the jury were told, after a recital of many facts which the evidence tended to prove, that if in view of such facts appellant believed and had reasonable grounds to believe deceased would proceed immediately to inflict bodily harm upon him with a knife, and that he would do so unless prevented by such act of self-defense as was then in his power, then appellant's acts were excusable on the ground of self-defense and apparent necessity. Thus far, aside from the improper recital of collateral facts, the instruction was correct, but it was qualified as follows: "Unless the jury find that *when the parties went out to settle the matters between them, not in an amicable way, but by force and violence, or in any way that might arise between them*, then they cannot acquit on the ground of self-defense and apparent necessity, and will find as stated in the third instruction"—*i. e.*, for manslaughter. The qualification was clearly erroneous, because it assumed that the parties went out to settle matters between them, *not in*

*an amicable way, but by force and violence, or in any way that might arise between them.*

The evidence tended to prove that the appellant knocked the deceased down with his fist, and that he fell with his head against a post from which a nail protruded one-half or three-quarters of an inch, and that his head struck the nail and the scalp was cut; that the appellant stamped upon the body of the deceased with his foot, and that the latter was insensible from that time until his death, the symptoms indicating that there was compression of the brain.

A medical witness testified that he cut into the skull at the wound made by the nail, but discovered no evidence of injury to the bone; but he, and other physicians, believing there was compression or extravasation of blood on the brain, and that the patient would die unless he could be relieved by trephining, they as a last resort sawed out a piece of the skull-bone about an inch in diameter and removed it, and found clotted blood resting on the brain; that they did not remove the blood, but placed the piece of bone in the aperture and left it there. This was a day or two before the patient died.

In view of this evidence the court gave the following instructions, viz.: "The court instructs the jury that though they may believe the death of Harrison was caused by the surgical operation, *yet if the operation was performed by physicians as a remedy for the wounds inflicted by the defendant, they cannot acquit him on that ground.*"

We cannot approve this as a principle of the law of the land. The mere fact that the operation was performed by physicians as a remedy for the wounds inflicted by the appellant, without any reference to the question whether such an operation was reasonably deemed to be necessary, or was performed by men of ordinary skill as surgeons, or in an ordinarily skilful manner, cannot render the appellant legally responsible for the death of Harrison, if in fact the operation and not the injuries inflicted by him caused his death.

The rule deducible from the authorities seems to be that where the wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary in the opinion of competent surgeons, upon one who has been wounded by another, and such operation is itself the

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immediate cause of the death, the person who inflicted the wound will be responsible. *Commonwealth v. McPike*, 3 Cush., 181; *Parsons v. The State*, 21 Ala., 300. But if the death resulted from grossly erroneous surgical or medical treatment, the original author will not be responsible. 21 Ala., 300.

It should, therefore, have been left to the jury in this case to say whether the operation performed on the deceased was such as ordinarily prudent and skilful surgeons, such as were to be procured in the neighborhood, would have deemed necessary under the circumstances in view of the condition of the patient, and whether it was performed with ordinary skill; and they should have been told that if they found the affirmative of these propositions, the appellant was responsible, although the operation and not the wound inflicted by him caused the death; but that, if they found that the operation would not have been deemed necessary by such ordinarily prudent and skilful physicians and surgeons, or if it would have been deemed necessary and was not performed with ordinary skill, and the death resulted from the operation and not from the injuries inflicted by appellant, they ought to acquit him, even though they might believe such injuries would eventually have proved fatal.

For the errors indicated, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

*Judgment reversed.*

# ORTWEIN vs. COMMONWEALTH.

(76 Pa. St., 414.)

## HOMICIDE: *Insanity.*

A charge that "if the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict" is properly refused.

To justify an acquittal, in cases of homicide, on the ground of insanity, the evidence must be sufficient to satisfy the minds of the jury that the respondent was insane at the time of the killing. A doubt is not sufficient.

AGNEW, C. J. The chief question in this case arises under the fifth point of the prisoner, which was negatived by the courts below. It is this:

5. If the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict.

The industry of the able counsel of the prisoner has collected and classified many cases on this point. While we think their weight accords with our own conclusions, we cannot help perceiving, in their number and variety, that the decision of the question should rest rather on a sound basis of principle than on the conclusions of other courts. In order to apprehend the true force of the principles to be applied, we must keep in the foreground the facts of the case before any question of insanity can arise. Insanity is a defense. It presupposes the proof of the facts which constitute a legal crime, and is set up in avoidance of punishment. Keeping in mind, then, that an act of wilful and malicious killing has been proved and requires a verdict of murder, the prisoner, as a defense, avers that he was of unsound mind at the time of the killing, and incapable of controlling his will; and, therefore, that he is not legally responsible for his act. This is the precise view that the statute itself takes of the defense, in declaring the duty of the jury in respect to it. The 66th section of the Criminal Code of 31st March, 1860, taken from the act of 1836, provides: "In every case in which it shall be given in evidence, upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offense, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense and declare whether he was acquitted by them on the ground of such insanity." Thus the verdict must find the fact of insanity, and that the acquittal is because the fact is so found. The law then provides for the proper custody of the insane prisoner. This being the provision of the statute, it is evident that a jury, before finding the fact of insanity specially, must be satisfied of it by the evidence. A reasonable doubt of the fact of insanity cannot, therefore, be a true basis of the finding of it as a fact, and as ground of acquittal and of legal custody. To doubt one's sanity is not necessarily to be convinced of his insanity.

It has been said in a nearly analogous case, "As to whether a reasonable doubt shall establish the existence of a plea of self-defense, I take the law to be this: If there be a reasonable doubt that any offense has been committed by the prisoner, it operates to acquit. But if the evidence clearly establishes the killing by

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the prisoner, purposely, with a deadly weapon, an illegal homicide of some kind is established, and the burden then falls upon the prisoner, and not on the commonwealth, to show that it was excusable as an act of self-defense. If, then, his extenuation is in doubt, he cannot be acquitted of all crime, but must be convicted of homicide in some one of its grades — manslaughter at least. *Commonwealth v. Drum*, P. F. Smith, 22. Such, also, was the opinion of the late Chief Justice LEWIS, a most excellent criminal law judge, when president of the Lancaster county oyer and terminer, in the trial of John Haggerty, in the year 1847. Lewis, U. S. Crim. Law, 402. He said, p. 406: "The jury will decide upon the degree of intoxication, if any existed, and upon the existence of insanity. The burden of proof of this defense rests upon the prisoner; the fact of killing under circumstances of deliberation detailed in this case being established, the insanity which furnishes a defense must be shown to have existed at the time the act was committed. The evidence must be such as satisfies the minds of the jury." Thus, according to both statutory and judicial interpretation, the evidence to establish insanity as a defense must be satisfactory, and not merely doubtful.

If we now analyze the subject, we shall find that this is the only safe conclusion for society, while it is just to the prisoner. Soundness of mind is the natural and normal condition of man, and is necessarily presumed, not only because the fact is generally so, but because a contrary presumption would be fatal to the interests of society. No one can justly claim irresponsibility for his act contrary to the known nature of the race of which he is one. He must be treated and be adjudged to be a reasonable being until a fact so abnormal as a want of reason positively appears. It is, therefore, not unjust to him that he should be so conclusively presumed to be, until the contrary is made to appear on his behalf. To be so made to appear to the tribunal determining the fact, the evidence of it must be satisfactory and not merely doubtful, as nothing less than satisfaction can determine a reasonable mind to believe a fact contrary to the course of nature. It cannot, therefore, be said to be cruel to the prisoner, to hold him to the same responsibility for his act, as that to which all reasonable beings of his race are held, until the fact is positively proved that he is not reasonable. This statement derives additional force from the opinion of Chief Justice Gibson,

in the case of *The Commonwealth v. Mashler*, tried before him and Justices Bell and Coulter, in Philadelphia, and quoted from in Lewis's U. S. C. L., 403-4. "Insanity," he says, "is mental or moral, the latter being sometimes called homicidal mania, and properly so. A man may be mad on all subjects, and then, though he may have a glimmering of reason, he is not a responsible agent. This is general insanity; but if it be not so great in its extent or degree as to blind him to the nature and consequences of his moral duty, it is no defense to an accusation of crime. It must be so great as entirely to destroy his perception of right and wrong, and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination controlling his will, making the commission of the act, in his apprehension, a duty of overruling necessity." Again: "Partial insanity is confined to a particular subject, being sane on every other. In that species of madness it is plain that he is a responsible agent if he were not instigated by his madness to perpetrate the act. He continues to be a legitimate subject of punishment, although he may be laboring under a moral obliquity of perception, as much so as if he were merely laboring under an obliquity of vision." And again: "The law is, that whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject and to have taken from him the freedom of moral action." Thus all the utterances of the chief justice on this subject are positive and emphatic, and allow no room for doubts, or merely negative expressions.

And if this reasoning were even less than conclusive, the safety of society would turn the scale. Merely doubtful evidence of insanity would fill the land with acquitted criminals. The moment a great crime would be committed, in the same instant, indeed often before, would preparation begin to lay ground to doubt the sanity of the perpetrator. The more enormous and horrible the crime, the less credible, by reason of its enormity, would be the required proof of insanity to acquit of it. Even now the humanity of the criminal law opens many doors of escape to the criminal. Then a wider door would be opened by the doubtful proof of insanity made still more open by the timidity of jurors, their loose opinions on the subject of punishment, and their common error that the punishment is the conse-

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quence of their finding of the truth of the facts, instead of the consequence of the commission of the crime itself. The danger to society from acquittals, on the ground of a doubtful insanity, demands a strict rule. It requires that the minds of the triers should be satisfied of the fact of insanity. Finally, we think this point has been actually ruled by this court in the case of *Lynch v. Commonwealth*, decided at Pittsburg, in 1873. The prisoner's second point was in these words: "That if the jury had a reasonable doubt as to the condition of the defendant's mind at the time the act was done, he is entitled to the benefit of such doubt, and they cannot convict." The court below said in answer: "The law of the state is that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground." This ruling was sustained.

[Opinion by READ, C. J. See Pittsburg Legal Journal, 14, 53. The rest of the opinion is not considered important. REP.]

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PEOPLE vs. OLMSTEAD.

(30 Mich., 431.)

HOMICIDE: *Manslaughter in attempting an abortion — Evidence — Expert — Dying declarations — Sustaining impeached witness — Pleading — Information.*

On the trial of a prosecution for manslaughter in attempting to procure an abortion, it is competent to prove any facts tending to show of what the deceased died.

It is not proper to admit the opinion of a witness as to what a person died of, without showing in the first place that the witness had made a sufficient examination of the deceased, and had such knowledge or experience as would qualify her to give an opinion.

On the trial of respondent for manslaughter in attempting to procure an abortion, it was held that an exclamation by the deceased the day before she died, *i. e.* "Oh, Aleck, what have we done? I shall die," was not admissible as a dying declaration.

It is not competent to sustain the credit of a witness, who has been impeached by proof that he had made different statements, of the circumstances testified to by him on the trial, by evidence of his general reputation for truth and veracity.



The respondent cannot be convicted of statutory manslaughter, in attempting to procure an abortion, on an information, charging him simply with manslaughter, which does not recite the facts which constitute the crime under the statute.

#### EXCEPTIONS from *Branch Circuit*.

*Isaac Marston*, Attorney General, for the people.

*N. P. Loveridge* and *L. T. N. Wilcox*, for respondent.

CAMPBELL, J. The respondent was informed against for manslaughter, in killing one Mary Bowers, whom it is averred he did "feloniously, wilfully and wickedly kill and slay, contrary to the statute in such case made and provided," etc. The information does not name the offense, nor the manner or means of its commission.

Upon the trial, the prosecution, in opening, stated that the prisoner was charged under § 7542 of the Compiled Laws, which is as follows:

"Every person who shall administer to any woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

The preceding section makes the malicious killing of an unborn quick child manslaughter, if done by an injury to the mother which would have constituted her murder if she had died.

The succeeding section makes all unnecessary attempts to produce the miscarriage of a pregnant woman, whatever may be the result, punishable as a misdemeanor.

The distinction, therefore, is clearly taken, as depending on the intent to destroy a living unborn child and supplies a defect at the common law, whereby such attempts were not felonious, and in some cases, at least, may not have been punishable at all.

The elements of the crime, as applied to the case before us, are found in the death of the mother, produced by acts intended to destroy a quick child; that term being used in the statute for an unborn child liable to be killed by violence. The ambiguity

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which, according to Mr. Bishop, seems to exist in some statutes, as to the foetal condition, is not found in our statutes, which cover the whole ground by different provisions. Comp. L., §§ 7541, 7542, 7543; Bish. Statutory Crimes, §§ 742-750, and cases cited.

The case was presented to the jury upon circumstantial evidence entirely, the cause of death being proved by medical testimony from a *post mortem* examination, and the connection of respondent with it being also inferential.

Upon the trial, one Lucy Stone was sworn as a witness, who testified to having been sent for by respondent on the day before the deceased died, to wash her and change her clothes. She testified to certain appearances upon the bed and clothing, and to a peculiar offensive odor which she said she had never noticed before at any time or place, although she had noticed something like it. This testimony was objected to, but we think it was allowable as going to show, in some degree, the condition of the deceased, and as a circumstance which was not irrelevant, and which might possibly be material with other proofs.

But without proof of any minute examination of the person of the deceased, or any facts on which she based her opinion, or of any knowledge or experience which might enable her to form an opinion, this same witness was allowed to answer the following question: "Will you state what in your opinion was the matter with Mrs. Bowers at that time?" Her reply was: "My opinion was that she had lost a child."

It is impossible to find any reason for receiving such proof. It involved an opinion which no medical man could give without a very full examination. It also undertook to show more than a mere miscarriage.

No witness, medical or otherwise, can be allowed to give testimony from his observation, concerning the nature of a person's illness or its causes, without proof both of a sufficient examination and such knowledge or experience as will qualify him to offer an opinion. This woman may or may not have possessed such knowledge as would allow her to give an opinion upon some of the medical questions involved in her answer, but she gave no proof of her knowledge, and gave no testimony upon which it could be inferred that her observation was such as would have justified any one in expressing an opinion. Whether it is within the power of medical science to determine from mere obser-

vation that there has been a miscarriage of a quick child, is a question we need not consider. It is certain that any competent physician would be very guarded in offering such an opinion. It is impossible to avoid the belief that the witness answered from her suspicions, and not from observation alone, and the question allowed to be put did not confine her to any such source of knowledge or inference. There is no occasion to review authorities upon so plain a case.

Objection was also made to the reception of testimony from Mrs. Belinda Wheeler, as to what was claimed to have been a dying declaration. This witness swore she was alone in the room with deceased the day before her death. Her account is as follows: "She was lying with her eyes shut. She did not open her eyes, and I put my hand on her wrist to see if I could feel her pulse, and then she spoke and says: 'Oh, Aleck, what have we done? I shall die.' I went away in a few minutes after that." And being further examined, she testified: "She did not open her eyes the last time I was there" (which was the time in question), or say anything else; I did not say anything." This is the whole proof, except some cross-examination about witness' statements on other occasions, bearing upon the existence of delirium.

Dying declarations, as is well settled, are neither more nor less than statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanction of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living. See *People v. Knapp*, 26 Mich., 112, and cases cited; also *Hurd v. People*, 25 id., 405.

The so-called declaration admitted here was entirely destitute of any feature of testimony in the proper sense of the term. There is nothing to indicate that it referred to the cause of death. It was not made for the purpose of explaining any act connected with the death. It formed no part of any conversation, and was called out by no question or suggestion, and does not purport to be a narrative of anything. Neither is there anything to indicate that it was made for any purpose, or in view of any expectation of death, or that the deceased knew to whom she was

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speaking, or that she meant to speak to any body. It is not even evident that she was awake or in her senses. The exclamation, if made in the manner described, is such a one as might naturally come from a person in agony, whose attention was completely distracted from the persons and things about her; and might easily have come from one quite unconscious of such matters.

It would be extremely dangerous, and contrary to every rule of evidence, to allow such an exclamation to be received as a dying declaration of facts, and to allow it to be eked out by suspicions and inferences, as was done here, so as to allow the jury to act upon it as if she had solemnly charged the respondent with being the author of her death, in the manner charged against him.

Two witnesses, Hattie Sweet and Belinda Wheeler, had been sworn for the prosecution, and evidence had been given by the defense to show that they had given different statements out of court upon material facts, and that one of them had testified differently on a former trial and examination. The court, against objection, allowed their credit to be supported by proof of general reputation for truth and veracity.

This, we think, was error. It is defended on the strength of certain intimations of Mr. Greenleaf (1 Greenl. Ev., § 469) and cases to which he refers. The origin of the doctrine, that the general good character of a witness may be shown in answer to any kind of impeachment seems to be referred to *Rex v. Clarke*, 2 Stark., 241, and to a reference in Starkie's Evidence to that case, as supporting it, and some decisions in this country appear to favor it.

But that case, if it be received as authority, decides nothing of the kind. It only holds that where a witness has been asked questions on cross-examination directly tending to discredit his character, — as, for example, whether he has been convicted of crime, or done acts which may disgrace him, — his good character may be shown to remove suspicions that might arise from that course of examination. It was not a case where a witness had been impeached by proof of contradictory statements, and there is no strong analogy between those two examples.

The question has been amply discussed in New York and Massachusetts, and settled against such a practice. The matter was

first considered, but not decided distinctly, in *People v. Rector*, 19 Wend., 596. In *People v. Hulse*, 3 Hill, 309, it was again disputed, and the doctrine settled against allowing the testimony. Bronson, J., gives some forcible reasons for that conclusion, while Cowen, J., was for receiving it, as he had intimated in *People v. Rector*. In *Starks v. People*, 5 Denio, 107, the court unanimously adhered to the ruling in *People v. Hulse*, and adopted the opinion of Judge Bronson. In 7 N. Y., 378 (*People v. Gay*), the court of appeals affirmed and approved *People v. Hulse*, and overruled the contrary opinions of Judge Cowen.

The case of *Russell v. Coffin*, 8 Pick., 143, is an early case in Massachusetts, where the question was carefully considered, and decided against receiving the sustaining testimony. Other cases are referred to by Judge Bronson to the same effect. And in *Brown v. Mooers*, 6 Gray, 451, Mr. Greenleaf's doctrine is emphatically repudiated as unfounded.

Looked at as a question of principle, it is not easy to see the propriety of permitting such proofs. It is, in effect, an attempt to impeach one witness by showing the good character of another whom he has contradicted. But, until impeached in some way, every witness has the legal presumption of good character, which would not be touched by another's character, and the rule is well settled that good reputation cannot be shown affirmatively before it is assailed by proof. If proof can be received which will allow good character to stand as a counterpoise to positive facts in one case, it would be very unjust to shut it out at any time.

The impeaching witness should be allowed to confirm his oath by it, if the impeached witness may use it against the impeacher, and the process would never come to an end.

It is not collateral, but direct, when offered upon the issue raised by an impeachment of general reputation. There the witness on one side asserts, and the opposing witness denies the same facts, and no side issues are raised. But whatever may be the likelihood that a man of good character will tell the truth, it will not turn falsehood into truth if he asserts a falsehood; and the attempt to sustain contradicted witnesses by evidence of character can only lead to endless inquiries, which are not likely to aid in getting at the facts in issue. It is far less satisfactory than the view and comparison of witnesses before the jury. It

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would require every witness (as well remarked by PARKER, C. J.) to bring his compurgators to support him when he is contradicted, and indeed it would be a trial of the witnesses, and not of the action. 8 Pick., 154.

We think the rule which excludes proof of character in such cases is sound and reasonable, and we are disposed to adhere to it.

A remaining question is of some consequence. Objection was made that the information was not properly framed to support the conviction.

The information is very brief, and consists of the single statement that respondent, on a day and year, and at a place named, "one Mary A. Bowers feloniously, wilfully and wickedly did kill and slay, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Michigan."

It is not claimed by any one that this would have been a good indictment at common law, not only for formal defects, but also for not indicating in any way the means or manner of causing death. But it is justified under our statute, which dispenses with allegations of these, and declares it sufficient "to charge that the defendant did kill and slay the deceased." C. L., § 7916.

Respondent claims that the constitutional right "to be informed of the nature of the accusation," involves some information concerning the case he is called on to meet, which is not given by such a general charge as is here made. And courts are certainly bound to see to it that no such right is destroyed or evaded, while they are equally bound to carry out all legislative provisions tending to simplify practice, so far as they do not destroy rights.

The discussions on this subject sometimes lose sight of the principle that the rules requiring information to be given of the nature of the accusation are made on the theory that an innocent man may be indicted, as well as a guilty one, and that an innocent man will not be able to prepare for trial without knowing what he is to meet on trial. And the law not only presumes innocence, but it would be gross injustice unless it framed rules to protect the innocent.

The evils to be removed by the various acts concerning indictments consisted in redundant verbiage, and in minute charges which were not required to be proven as alleged. It was mainly, no doubt, to remove the necessity of averring what need not be

proved as alleged, and therefore gave no information to the prisoner, that the forms were simplified. And these difficulties were chiefly confined to common law offenses. Statutory offenses were always required to be set out with all the statutory elements. *Koster v. People*, 8 Mich., 431. The statute designed to simplify indictments for statutory crimes, which is in force in this state, and is a part of the same act before quoted, reaches that result by declaring that an indictment describing an offense in the words of the statute creating it shall be maintained after verdict. C. L. § 7928. But both of these sections must be read in the light of the rest of the same statute, which plainly confines the omission of descriptive averments to cases where it will do no prejudice. And so it was held in *Enders v. People*, 20 Mich., 233, that nothing could be omitted by virtue of this statute, which was essential to the description of an offense.

Manslaughter, at common law, very generally consisted of acts of violence of such a nature that indictment for murder and manslaughter were interchangeable, by the omission or retention of the allegation of malice, and of the technical names of the offenses. In a vast majority of cases, a very simple allegation would be enough for the protection of the prisoner.

But where the offense of manslaughter was involuntary homicide, and involved no assault, but arose out of some negligence or fault from which death was a consequential result, and sometimes not a speedy one, the ordinary forms were deficient, and the indictment had to be framed upon the peculiar facts, and could convey no adequate information without this. See 2 Bish. Cr. Proceed., § 538.

The offense for which the respondent in this case was put on trial originated in the statute defining it, and could not have come within any of the descriptions of manslaughter at common law. An innocent person, charged under the information, could form no idea whatever, from it, of the case likely to be set up against him. He might, perhaps, be fairly assumed bound to prepare himself to meet a charge of manslaughter by direct violence or assault. But which one was meant, out of the multitudinous forms of indirect and consequential homicide that might occur after a delay of any time, not exceeding a year, from an original wrong or neglect, and of which he might or might not have been informed, he could not readily conjecture

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Nothing could inform him of this statutory charge, except allegations conforming to the statute. These, we think, he was entitled to have spread out upon the accusation. Without them, he was liable to be surprised at the trial, and could not be expected to prepare for it.

We are not prepared to hold this information bad upon its face, for we are disposed to think, and it was practically admitted on the argument, that it may apply to the ordinary homicides by assault. It was not, therefore, until the evidence came in, that it was made certain the case was different. The question of sufficiency does not arise directly upon the record, but on the bill of exceptions, and the error was in permitting a conviction on it.

The other questions are closely connected with this, and need not be considered further.

It must be certified to the court below that the verdict should be set aside, and that no further proceedings on this charge should be had under this information as it stands.

The other justices concurred.

NOTE.—In *People v. Davis*, 56 N. Y., 95, which was a prosecution for advising and procuring a woman to submit to the use of an instrument, and to take drugs and medicines for the purpose of procuring a miscarriage, and thereby causing the death of mother and child, it was held that the woman's dying declarations were not admissible against the respondent, because the death of the woman was not the subject of the charge, such death being merely an aggravation of the real charge, which was the persuading her to submit to and take measures to procure the miscarriage.

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### LEIBER vs. COMMONWEALTH.

(9 Bush, Ky., 11.)

#### HOMICIDE: *Dying declarations — Erroneous charge.*

On a trial for murder, dying declarations of the deceased should be restricted to the act of killing and the circumstances immediately attending it, and forming part of the *res geste*, and it is error to allow them to be given in evidence as to distinct transactions from which the jury may infer malice on the part of the respondent toward the deceased.

On a trial for murder, a charge that "if the jury find that the respondent struck the deceased with a piece of wood, which was likely to produce death when used as he did use it, and that deceased died, etc.," is erroneous in assuming as a fact that respondent used the piece of wood in a manner calculated to produce death.

HARDIN, J. This appeal is prosecuted for the reversal of a judgment and sentence of death, rendered upon a verdict convicting the appellant on an indictment for the murder of Charles Goennewein.

In the argument for the appellant, the correctness of the action of the circuit court is questioned, both as to its rulings in relation to the admissibility of evidence, and upon various propositions to instruct the jury. The first question thus presented for the determination of this court, and, as we conceive, the most important one which it will be necessary to decide, is, as to the competency of certain statements which were made by Goennewein shortly before his death, and which were proved and admitted as evidence, notwithstanding the objections of the defendant, as the dying declarations of the deceased, to be considered by the jury together with other evidence conducing to sustain the charge in the indictment. Those declarations not only conduced to identify the defendant as the perpetrator of the alleged homicide, and to establish and explain the circumstances of the *res gestæ*, but also purported to disclose former and distinct transactions not relating to the particular facts constituting the subject matter of the charge, or the identification of the defendant, but from which the jury might have inferred the existence of malice on the part of the appellant towards the deceased. And the essential inquiry involved, and on which the correctness of the ruling of the court under consideration seems solely to depend is, whether the court did not err in admitting so much of the dying statements of the deceased as did not relate to, and were not necessary to establish the circumstances or direct transactions from which his death resulted, and to identify and connect the defendant with them.

On this question there is some contrariety of adjudication; but the decided weight of authority on the subject seems to be to the effect that it is a general rule that dying declarations, although made with a full consciousness of approaching death, are only admissible in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declarations. 1 Whart. Am. Crim. L., sec. 675; 2 Russell on Crimes, p. 761; Rose. Crim. Ev., p. 23; 1 Greenl. Ev., sec. 156; *Nelson v. The State*, 7 Humph., 542; *State v. Sheton*, Jones' Law, N. C., 360.

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The admission of dying declarations as evidence being in derogation of the general rule, which subjects the testimony of witnesses as ordinarily received to the two important "tests of truth," an oath and a cross-examination, it is obvious that such evidence should be admitted only upon grounds of necessity and public policy, and should be restricted to the act of killing and the circumstances immediately attending it, and forming a part of the *res gestæ*.

It results that in our opinion the court erred to the prejudice of the appellant, in admitting a part of the dying statements of Goennewein, however competent the residue may have been, and for that cause, if for no other, the judgment should be reversed. Wit. reference to the action and decision of the court upon the motions to instruct the jury, we deem it sufficient to say that while we perceive but little if any ground for complaint as to most of them, the sixth instruction which the court gave is objectionable, in that it assumes as a fact that the appellant used the instrument with which he was charged to have slain Goennewein in a manner calculated to produce death. We would suggest, moreover, that we regard the instructions given, when considered together, as somewhat too numerous and prolix for a perspicuous presentation of the law of the case.

Wherefore the judgment is reversed, and the cause remanded for a new trial, on principles not inconsistent with this opinion.

NOTE. — That part of the sixth instruction, which the court held to be erroneous, reads as follows: "If the jury believe, from the evidence, to the exclusion of a reasonable doubt, that the accused, not in his apparently necessary defense, but of his malice aforethought, and without considerable provocation given at the time he assaulted and struck the deceased with a piece of wood, which was likely to produce death when used as he did use it," etc.

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UDDERZOOK vs. COMMONWEALTH.

(76 Pa. St., 340.)

HOMICIDE: *Photography — Evidence — Practice.*

On a trial for homicide, a photograph, clearly proven to be a photograph of the deceased, was shown to a witness, who testified, under objection, that it resembled the body found supposed to be that of the deceased. No evi-

dence was given that the photograph was a good picture, or as to its resemblance to the deceased. The evidence was held properly admitted. Courts will take judicial cognizance that photography produces correct likenesses, the production of the photograph being governed by the operation of natural laws.

For the purpose of identifying deceased with one, who at one time went under a different name, it is proper to prove that both were in the habit of becoming intoxicated. Personal habits are means of identification.

There is no error in allowing a jury to take documents to the jury room, where they have been admitted in evidence and exhibited to the jury during the trial.

AGNEW, C. J. This is, indeed, a strange case, a combination by two to cheat insurance companies, and a murder of one by the other to reap the fruit of the fraud. Winfield Scott Goss, an inhabitant of Baltimore, had insured his life to the amount of \$25,000. He was last seen at his shop, on the York road, a short distance from Baltimore, on the evening of the 2d of February, 1872, in company with William E. Udderzook, his brother-in-law, the prisoner, and a young man living near. They left him to go to the house of the young man's father.

In a short time the shop was discovered to be on fire. After it had burned down, a body was drawn out of the fire, supposed to be that of Goss. Claims were made upon the insurance companies, the prisoner being active in prosecuting them. On the 30th of June, 1873, the prisoner and a stranger, a man identified as Alexander C. Wilson, appeared at Jennerville, in Chester county, this state, and remained over night and the next day. In the evening, July 1st, the prisoner and the stranger left Jennerville together in a buggy. Next day, on being met and asked what had become of his companion, the prisoner said he had left him at Parkersburg. On the 11th of July, the body of a man, identified on the trial as W. S. Goss, or A. C. Wilson, was found in Baer's woods, about ten miles from Jennerville, the head and trunk buried in a shallow hole in one place, and the arms and legs in another. The stranger, who was with the prisoner at Jennerville, identified as A. C. Wilson, was traced from place to place, living in retirement, from June 22, 1872, until within a day or two of the time when he appeared with the prisoner at Jennerville. During this interval this prisoner and Wilson were seen together several times, under circumstances indicating great intimacy and privacy. Wilson has not been seen or heard of

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since the evening of July 1st, 1873, when he left Jennerville in company with the prisoner. The great question in the case was, the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's woods was that of Goss.

All the bills of exceptions, except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore on the same plate with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait, or a miniature, painted from life and proved to resemble the person, may be used to identify him, cannot be doubted, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life, and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs we see, are not the original likenesses; their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies, taken from the original plate, called the negative, made sensitive by chemicals, and printed by the sunlight through the camera. It is the result of art, guided by certain principles of science.

In the case before us, such a photograph of the man Goss was presented to a witness who had never seen him, so far as we knew, but had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photographs as an established means of producing a correct likeness. The Daguerrean process was first given to the world in 1839. It was soon followed by photography, of which we have had nearly a generation's ex-

perience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of persons, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate, made by the rays of light through the camera, are dependent on the same general laws which produce the images of outward forms upon the retina through the lenses of the eye. The process has become one in general use, so common that we cannot refuse to take judicial cognizance of it as a proper means of producing correct likenesses.

But, happily, the proof of identity in this case is not dependent on the photograph alone. Letters from Wilson identified as the handwriting of Goss; a peculiar ring, belonging to Goss, worn upon the finger of Wilson; the recognition of Wilson, by A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to and from Baltimore, and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss independently of the photograph.

The objection to the proof of Goss' habits of intoxication is equally untenable. True, the habit is common to many, and alone, would have little weight. But habits are means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury.

It is unnecessary to follow the bills of exceptions in detail. They all relate to facts and circumstances bearing on the question of identity. If the bills of exceptions are many, they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof.

They are the many links in a chain so long that it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barnitz and A. R. Carter were unobjectionable. Whether they really could not identify the dark and swollen face of the corpse, it was not for the court to decide; its weight belonged to the jury.

There was no error in permitting the jury, after their return into the court for further instructions, to take out with them, at their own request, the letters, check, due bill and application for insurance, papers which had been proved, read in evidence and

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commented on in the trial. The appearance, contents and hand-writing of these documents were no doubt important, and to be respected by the jury, who could not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offense.

We discern no error in this record, and therefore affirm the sentence and judgment of the court below, and order this record to be remitted for execution.

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FRASER *vs.* STATE.

(55 Ga., 325.)

HOMICIDE: *Evidence — Motive — Admissions.*

On a prosecution for murder, evidence that the respondent's wife being dead, he cohabited illicitly with a step-daughter, and was anxious to marry her, and that deceased had taken the step-daughter to his house and refused to give her up, and that deceased had contested in a *habeas corpus* case the right of respondent to get the step-daughter and other step-children back to his house, is admissible as tending to show a motive.

On a trial for murder, any evidence which tends to show a motive is material and admissible.

On a trial of respondent for murdering a man who had broken up illicit intercourse between respondent and his step-daughter, and continued to prevent such intercourse, letters of respondent showing great anxiety to get possession of the step-daughter's person are admissible as tending to show motive.

On a trial for felony, any statements which have been made by the respondent as to any fact circumstantially material to the issue are admissible against him. Accordingly, where it was material to show that respondent had ridden very fast, it was *held* competent to prove his previous statements as to the speed of his horse.

In this case, the evidence is held sufficient to warrant the verdict of guilty.

JACKSON, J. Dr. Joseph B. Dunwoody was murdered at the door-sill of his house in Houston county, under circumstances of great atrocity. He was called out between ten and eleven o'clock at night, as if to visit a patient, and while talking to the mur-



derer about the supposed sick person, he was shot down by the false messenger. Suspicion rested upon the defendant; he was arrested, tried and found guilty, and being recommended to mercy by the jury, was sentenced to the penitentiary for life. A motion was made for a new trial on various grounds, it was overruled on all of them, and the case comes before us for review. The evidence is very voluminous; the question turns on circumstantial testimony, and without going into detail, it will be sufficient to state briefly the points made in the motion for a new trial, and the facts on which these points rest for decision.

1, 2. The defendant had step-children; his wife was dead; one of these step-children he cohabited with illicitly, and sought to marry her. They all left him, and deceased took them to his house and cared for them, and this testimony was admitted to go to the jury. We think it legal as showing motive in the defendant to kill, and coupled with an effort to get them back, and resistance on the part of deceased in a *habeas corpus* case, it is admissible to show malice, and therefore one ingredient, and the main one, of murder.

3. Letters were also introduced showing an eager desire to get possession of the step-daughter, whom he wished to marry; one to her and one to another person, one without date and the other purporting to come from Atlanta, where defendant had not been. One of the letters admitted the incestuous intercourse with the girl. These were also objected to. We think them admissible for the reasons given above.

4. The court told the jury that the state claimed that there had been a difficulty between deceased and prisoner, and that they should see about that; and this was objected to as an erroneous charge. We think the charge right. There had been difficulties about these children, especially the much injured girl, and it was proper for the jury to consider them.

5. It is also complained that the sayings of defendant about the speed of his horse were admitted to go to the jury. It was right, we think. The defendant was twelve or thirteen miles off at eight o'clock at night or after, and the speed of the horse to show that he could make the distance by a little after ten, in less than two hours, was material to the issue, and he ought to have known how swift the horse he was riding was, and his sayings are against himself.

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6. The verdict, we think, is right; at all events, it was for the jury to decide on the facts. Their decision is sustained by the evidence, and is not against law. No complaint is made of the charge except upon the single point alluded to about the difficulty between deceased and defendant, and we presume the court gave the law correctly as to circumstantial evidence, and how full and clear and exclusive of other rational theories of the case, consistent with the evidence, it should be, to authorize a conviction.

Defendant said he had been to kill a man, who was not at home, the night before, and the murderer was at Dunwoody's the night before, and Dunwoody was not at home. Defendant had a double-barreled shot-gun, and rode a horse such as is described. This gun was loaded with the sort of buckshot which killed deceased, and in the door and house where the killing was done. He took ten buckshot to load it, one fell on the floor and did not go in the gun, and nine were found. One witness recognized him on the gray horse, and riding rapidly towards Dunwoody's house. Many saw him but failed to recognize his face, but the description they gave fit his appearance. He failed to account for his absence from the party at Scarborough's, from eight o'clock to nearly midnight, and to account for his having a double-barreled gun, and taking it to the party, and leaving it outside concealed; and his own statement is by no means satisfactory. He was absent from three to five hours from the party, and in his statement, said he had gone to sleep in a fence corner, after trying to see a woman of easy virtue, who was not at home, and could show by no one who told him that she was not at home. The night was very cold. On the whole, we think he got off well by the recommendation to mercy, and his consequent imprisonment for life, and we decline to interfere.

*Judgment affirmed.*

McCULLOCH *vs.* STATE.

(48 Ind., 109.)

HOMICIDE: *Corpus delicti* — Circumstantial evidence — Confessions.

On a trial for murder, it appeared that a skeleton had been found corresponding in sex, size and race with the man whom respondent was charged with killing. *Held*, that this was sufficient direct evidence of a *corpus delicti*, and sufficiently laid the foundation for proving the skeleton to be that of the murdered man by circumstantial evidence.

On a trial for murder the prosecution put on the stand a convict who had been confined in prison with the respondent. The convict testified that respondent had told him that he had killed a man whom his conversation identified as the murdered man, and that respondent was afraid he would be tried for it when he got out. *Held*, that a charge which referred to this evidence as tending to show a voluntary confession without inducement was not erroneous.

WORDEN, J. The appellant was indicted in the court below for the murder of William C. Morgan, and, upon trial, was convicted and sentenced to imprisonment for life in the state prison. His counsel have filed an able and elaborate brief, insisting that the verdict was not sustained by the evidence, and that the court erred in its charges to the jury. We have read the evidence with care, and although it is mostly circumstantial in its character, we are satisfied that it established the guilt of the appellant without any reasonable doubt.

On the 5th of May, 1865, the deceased started from Wisconsin, with a pair of horses and a covered wagon, to come to Indiana. Some one got into the wagon with him, not shown to have been the appellant; but it was shown that the deceased and the appellant had previously made an arrangement to come together. This was the last that was ever seen or heard of Morgan by his friends or relatives.

In the autumn of 1867, a human skeleton, not quite entire, of the male sex and Caucasian race, and corresponding very well in point of size with Morgan, was found in a slough or pond, not far from a highway in Benton county, Indiana.

The skull had a hole in the lower posterior part, and a cut or gash on the top, apparently made with some sharp instrument. The latter could not have been self inflicted, and was sufficient to cause death.

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A chain of circumstances, proved on the trial, led to the conclusion beyond any reasonable doubt, that the skeleton was that of William C. Morgan, and that the appellant was guilty of his murder.

The circumstances are too numerous to be detailed in this opinion, and no good purpose would be subserved by setting them out. We are entirely satisfied with the conclusion arrived at by the jury upon the evidence.

The following are the charges excepted to by the defendant:

"6. To warrant a conviction in this case, you must first be satisfied beyond a reasonable doubt that the skeleton offered in evidence is the remains of a human being. When this fact is proved, then the state may prove by circumstantial evidence, that said remains are those of William C. Morgan, the man alleged to have been killed; and may also prove by the same kind of evidence that the defendant killed him. But to warrant a conviction on circumstantial evidence, it should be so strong as to exclude every reasonable hypothesis of innocence.

"7. Confessions alleged to have been made by the defendant are to be received with great caution, and are entitled to no consideration until the jury are satisfied from the evidence, beyond a reasonable doubt, that said Morgan was murdered. If the jury find that the fact of Morgan's murder is established beyond a reasonable doubt, by evidence independent of the defendant's confession, and that after his death, the defendant voluntarily, and without any inducement, confessed himself guilty of the crime, such confession, if the jury find beyond a reasonable doubt that it was made, may be considered by them as strong proof of guilt."

The counsel for the appellant insist that the sixth charge is wrong, inasmuch as by it the jury were told that if they believed that the skeleton offered in evidence was the remains of a human being, the state might prove by circumstantial evidence that it was the remains of William C. Morgan. They insist that as this was, in substance, a charge that the *corpus delicti* might be proved by circumstantial evidence, the charge was clearly wrong. They cite in support of the position taken, the case of *Ruloff v. The People*, 18 N. Y., 179.

It may be conceded, that much that is said in that case militates against the charge in question. But that case differs from

this. In that case, the defendant was charged with the murder of a child. There was no direct proof that the child was dead or had been murdered, or that her dead body had ever been found or seen by any one. The jury were asked to presume, and find from the lapse of time since the child and her mother were last seen, and from other facts and circumstances, that the child was dead, and had been murdered by the prisoner. The court held, that there must be direct proof of the *corpus delicti*.

Whether the court would have applied the doctrine to a case like the present is rendered quite doubtful by the closing paragraph of the opinion in the cause. "If," says the court, "what is said by these writers is to be taken as intimating their opinion that Lord Hale's rule may be departed from, I find no judicial authority warranting the departure. The rule is not founded on a denial of the force of circumstantial evidence, but in the danger of allowing any but unequivocal and certain proof that some one is dead, to be the ground on which, by the interpretation of circumstances of suspicion, an accused person is to be convicted of murder."

In the case in judgment, the skeleton supplied what it would seem the court in the New York case thought to be lacking in order to a conviction on evidence otherwise circumstantial.

In the case of the *State v. Williams*, 7 Jones, N. C., 446, it was held, that in a case where the supposed body of the person alleged to have been murdered had been destroyed by fire, leaving remains shown to have been human, the *corpus delicti* might be proved by circumstantial evidence. So in the case of *Stocking v. The State*, 7 Ind., 326, where the body was destroyed by fire, this court said: "The *corpus delicti* may, like any other part of the case, be proved by circumstantial evidence."

We shall not enter upon an extended examination of the authorities upon this question, but content ourselves with the citation of a few passages from elementary writers:

"The *corpus delicti*, or the fact that a murder has been committed, is so essential to be satisfactorily proved, that Lord Hale advises that no person be convicted of culpable homicide, unless the fact were proved to have been done, or at least the body found dead. Without this proof, a conviction would not be warranted, though there were evidence of conduct of the prisoner exhibiting satisfactory indications of guilt. But the fact as we have

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already seen, need not be directly proved; it being sufficient if it be established by circumstances so strong and intense as to produce the full assurance of moral certainty." 3 Greenl. Ev., sec. 131.

Bishop says (1 Bish. Crim. Proc., sec. 1070), speaking of the doctrine of Lord Hale: "But this doctrine is rather one of caution and sound judgment than of absolute law, according to what appears to be the better and later English authority." Again, the same author, in the next following section, says: "If we look at this matter as one of legal principle, we can hardly fail to be convinced that, while the *corpus delicti* is a part of the case which should always receive careful attention, and no man should be convicted until it is in some way made clear that a crime has been committed, yet there can be no one kind of evidence to be always demanded in proof of this fact, any more than of any other. If the defendant should not be convicted when there has been no crime, so equally should he not be when he has not committed the crime, though somebody has; the one proposition is as important to be maintained as the other; yet neither should be put forward to exclude evidence which in reason ought to be convincing to the understanding of the jury."

We quote another paragraph from 3 Greenl. Ev., sec. 133: "But though it is necessary that the body of the deceased be satisfactorily identified, it is not necessary that this be proved by direct and positive evidence. Where only mutilated remains have been found, it ought to be clearly and satisfactorily shown that they are the remains of a human being, and of one answering to the size, age and description of the deceased; and the agency of the prisoner in their mutilation, or in producing the appearance found upon them, should be established. Identification may also be facilitated by circumstances apparent in and about the remains, such as the apparel, articles found on the person, and the contents of the stomach, connected with proof of the habits of the deceased in respect to his food, or with the circumstances immediately preceding his dissolution."

Whatever may be the law in respect to cases where no supposed remains of the person charged to have been murdered have been found, as was the case in *Ruloff v. The People*, *supra*, we are of opinion that the charge given, as applied to the case made

by the evidence, was not erroneous. Circumstantial evidence, as we think, was clearly competent to identify the skeleton produced as the remains of William C. Morgan, as well as to show the cause and manner of his death.

We pass to the seventh instruction. We do not understand that counsel for the appellant question the correctness of this instruction as an abstract proposition; but they insist that there was no evidence given to which such charge could be applied, and therefore that it was erroneous. They claim that the appellant made no deliberate confessions of his guilt, and that the charge was calculated to do him harm, by impressing the jury with the idea that what he did say amounted to such confession. The evidence in respect to the confessions of the appellant, as it appears in the bill of exceptions, is as follows:

"Henry C. Warrell, a witness for the state, being duly sworn, testified as follows: 'I am acquainted with the defendant; we roomed together in the Illinois state's prison; I knew him in prison as James McCulloch; I saw him frequently for some three years; I saw him the spring of 1872; my memory is very poor; I am a prisoner myself; there was considerable talk in the prison about his case and mine; I was in for burglary; I heard him make remarks about being uneasy about being arrested when his time was up; I will give you the substance of it as well as I can now remember: He told me he expected to be arrested on a charge of murder; he said he had killed a man by the name of Morgan, and he was afraid the deceased man's father would arrest him when his time expired; that the only proof that would be against him was that he was seen in company with the man, and was caught in possession of his team; I do not know that there was much more said at that time. I did not believe it, and did not pay much attention to it; I heard him make little remarks about his being uneasy about being arrested when he got out. There was a convict in prison at that time by the name of Col. Cross, a kind of a lawyer; I cannot explain every word; he went to him for information; he said they had found the skeleton that was said to be the man he murdered; he wanted to know if it would be any evidence against him, if it could not be identified. I think Col. Cross said it would be no evidence against him; and that is all the conversation I heard, except his expression about being uneasy; he got some letters from his

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wife; he said there was nothing said lately about the Morgan case.'

"On cross-examination, the witness testified as follows: 'I am a convict, and have been convicted on three different indictments for burglary; sentenced ten years; have served five years and four months of the time; I was brought here in chains; I left them off outside; the defendant told me in this same conversation, and at other times, that he wanted them to take him out and try him then, and not bother him when his time was out; in this same conversation I spoke of awhile ago, he said he was an innocent man; that he was innocent of the charge; my memory is very poor; he always said he wanted to be tried then for the charge, and not be bothered when he got out; he never said he wanted to get out and be tried after the skeleton was found.'"

The evidence, as it comes up to us, is a little obscure in this, that it does not very distinctly appear to what conversation the witness alluded as the one he spoke of "awhile ago," in which the defendant said he was an innocent man, etc. The witness had spoken of several conversations. In one of these the defendant, according to the witness, said he had killed a man by the name of Morgan, etc. Then the defendant had a conversation with Col. Cross, and took his advice. Then he said at other times that he wanted them to take him out and try him, etc. It does not appear in which of these conversations it was that he said he was innocent. It cannot be rightfully assumed that it was necessarily in the one in which he said he had killed a man by the name of Morgan.

With this evidence before the jury, we think the court was clearly justified in giving the charge in question. There is no error in the record, and the judgment below must be affirmed.

The judgment below is affirmed, with costs.

## BURNS vs. STATE.

(40 Ala., 370.)

HOMICIDE: *Evidence—Admissions—Threats by deceased—Res geste—Error must be injurious.*

On a trial for murder, where the prosecution have proved statements made by the respondent immediately after the killing, tending to show that he killed the deceased, the respondent has a right to have the whole conversation, including the explanation that he then made of the fact.

But the record not disclosing what the respondent expected to prove by a witness, the court cannot reverse the judgment because the trial court excluded a legal question. For all that appears under such circumstances, the exclusion of the question may have been a benefit to the respondent. It must affirmatively appear by the record that an error complained of was injurious to the party.

On a trial for murder, where it had appeared that the deceased had gone to find the respondent, and armed himself with a revolver and a knife, saying that he intended to have a settlement with the respondent, and that when the respondent came up, the deceased spoke to him, and the two walked off together and shortly afterwards the report of a pistol was heard, but there was no evidence of the circumstances immediately preceding the killing, after the two walked away together: It was held, that the respondent had a right to prove that the deceased had said when starting to find him, that he was going to kill him, and used these words: "When you hear from me, you will hear that him or me is dead." Such declarations are admissible under the circumstances, as a part of the *res geste*.

On a trial for murder, threats made by the deceased against the respondent, which are not admissible as part of the *res geste*, and which were not communicated to the respondent, are inadmissible in his behalf.

Confessions deliberately made, and precisely identified, are often most satisfactory evidence; but mere verbal admissions, unsupported by other evidence, should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them.

FROM the Circuit Court of *Blount*.

Tried before the Hon. WILLIAM J. HARALSON.

The prisoner in this case was indicted in September, 1870, for the murder of Pickens Musgrove; pleaded not guilty to the indictment; was tried at the March term, 1873, convicted of murder in the second degree, and sentenced to the penitentiary for ten years. On the trial, he reserved several exceptions to the rulings of the court, which are thus stated in the bill of exceptions: "The state having given evidence tending to show that at a certain time, about the 5th day of January, 1870, in said county of Blount, the deceased came to the still-house of his father, El-

ward Musgrove, if the deceased had no settlement about this his horse, up to him, they were the defendant minutes the him, to help two persons distant, where him to the where he defendant, who was wounded scratches on said witness ant, when else than w to go with shot?" The time. that he (dejected to the tained the excepted. "During offered to house of deceased al ceased start that he told fendant, an him or me admission because the to which ru

ward Musgrove, about four o'clock in the evening, and inquired if the defendant was there, or had come yet; and being told that he had not, proceeded to load his pistol, and sharpen a knife which he had at the still-house, saying that he intended to have a settlement with the defendant; that the defendant rode up about this time, driving some of his father's hogs, got down from his horse, and was about fastening him, when the deceased went up to him, and spoke to him, and they walked off together; that they were absent some time, when a pistol shot was heard; that the defendant came up to the still-house, in from five to twenty minutes thereafter, and called for some persons there to go with him, to help take care of the deceased, whom he had shot; that two persons went with him to the place, some four hundred yards distant, where they found the deceased, wounded, and carried him to the still-house, whence he was taken to his father's house, where he died in a few days from the wound; and that the defendant, when he came to the still-house after the shot was heard, was wounded in the leg, as if with a sharp knife, and had some scratches on his throat. The defendant, by his attorneys, asked said witness, Henry Brasseal, who stated the above, if the defendant, when he came to the still-house for help, stated anything else than what is above set forth, to wit: "that he wanted them to go with him, to help take care of the deceased, whom he had shot?" The witness replied, that he did say something else at the time. The defendant then asked said witness to state all that he (defendant) said at that time. The state's attorney objected to the witness answering this question, and the court sustained the objection; to which the defendant, by his counsel, excepted.

"During the further progress of the cause, the defendant offered to prove, by one Cassey Speigle, who was staying at the house of said Edward Musgrove in January, 1870, where the deceased also lived at that time, that she was present when the deceased started to the still-house on the evening he was shot; and that he told her, when starting, that he intended to kill the defendant, and said, 'When you hear from me, you will hear that him or me is dead.' The solicitor for the state objected to the admission of this evidence, and the court sustained the objection, because the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the defendant offered to prove, that when he came to the still-house to obtain help for the deceased, and told the witness that he had shot him, he also said, 'and I fear I have killed him. I would not have done it for the world, but he was trying to kill me, and I couldn't help shooting him.' To this the solicitor for the state objected, and the court sustained the objection, to which the defendant excepted.

"In the further progress of the cause, the defendant offered to prove by Nancy Dutton and Taylor Dutton that the deceased, the day before he was shot, came to their house in the morning, on his way to Blountsville, and in the night, on his return home, and on both occasions inquired if they had seen the defendant pass that day, or knew where he was, and stated his intention to kill him. The state objected to the admission of this evidence, and the court sustained the objection, because the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the defendant offered to prove by one Calvin Hudson, that on the day before, or at most a very few days before, the deceased was shot, he had a conversation with him in Blountsville, in which the deceased wanted to borrow his pistol, and [said] that he wanted to make a certain man take back something he had said; and that he (witness) understood that the defendant was the 'certain man' mentioned. To which the solicitor for the state objected, and the court sustained the objection, on the ground that the same had not been communicated to the defendant; to which ruling the defendant excepted.

"In the further progress of the cause, the state having introduced certain testimony tending to prove confessions, or admissions of guilt made by the defendant, the court was requested to charge the jury, in writing, as follows: 'Admissions are a species of evidence which, from the ease with which they can be fabricated, and the liability to misapprehend what was said, should always be scrutinized and received with great caution by the jury.' Which charge the court refused to give, and the defendant excepted.

"The defendant also requested the court, in writing, to charge the jury as follows: 'That although they may be satisfied, from

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the evidence, that the previous general character of the witness Johnson, for truth and veracity, was good; yet if they believe, from the evidence, that said witness has made different or contradictory statements of the circumstances attending the alleged confession, they may look to these contradictory statements to ascertain whether or not, and if so, how much, credit should be given to the testimony.' The court refused to give this charge, and the defendant excepted.

"The defendant also asked the court to give the following charge, which was in writing: 'The defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of innocence.' The court refused to give this charge, and the defendant excepted to this refusal."

*Hamill, Palmer & Dickinson*, for the prisoner.

*Ben. Gardner*, Attorney General, for the state.

BRICKELL, J. The general rule, often announced by the court, is, that a party to a proceeding, civil or criminal, taking a bill of exceptions, must affirmatively show error to his prejudice, or the proceedings will not be disturbed. *Eskridge v. The State*, 23 Ala., 30; *Butler v. The State*, 22 id., 43. In this case, the state having given in evidence the declarations of the prisoner on his return to the still-house after the shooting, it was his clear right to adduce the whole of what he said at that time, in reference to the unfortunate transaction. 1 Greenl. Ev., § 218. This rule has been announced by this court so often, and it is so clearly expressed in the text-books, that we are not ready to presume any court has infringed it. The bill of exceptions does not inform us what the prisoner said at the same time, and in the same connection, which the court declined to permit him to give in evidence. Though it may have been part of the same conversation of which the state gave evidence, we cannot say that it had any reference to the killing, or to the circumstances attending the killing; nor can we say that its exclusion did not benefit, rather than prejudice the prisoner. An exception to the admission or rejection of evidence should always disclose the evidence admitted or rejected, or a revising court cannot intelligibly pass judgment on it.

2. The prisoner offered to prove exculpatory declarations made

by him when he returned to the still-house after the shooting, which the court excluded. The bill of exceptions does not inform us whether these declarations formed part of the conversation of which the state gave evidence, or whether they were made in another and subsequent conversation. Of course, we cannot say that the court erred in rejecting them. It may be proper for us to repeat the rule by which the court should be governed in determining the admissibility of this evidence. The prisoner cannot give in evidence his own declarations, unless they form part of the *res gestæ*; but if the state give evidence of his confessions, declarations, or admissions, it is his right to lay before the jury all that he said at the time, referring to the killing, and the circumstances attending it. It is the province of the jury to determine the credibility and weight of the declaration or confession. The jury must weigh the whole, rejecting no part unless for some sufficient reason; but they may, in the exercise of their judgment, give more credence to one part than to another, or may deny credence to a part or to the whole. *Williams v. The State*, 39 Ala., 532; *Chambers v. The State*, 26 id., 59; 1 Greenl. Ev., § 218.

3. It appears from the evidence set out in the bill of exceptions, that the killing was at or near a still-house. That the deceased reached the still-house before the prisoner, and on reaching the house, inquired for the prisoner; that, being informed the prisoner was not there, he obtained a knife, and sharpened it, and loaded his pistol, declaring that when the prisoner came, "he intended to have a settlement with him;" that the prisoner rode up about this time, and while he was fastening his horse, the deceased spoke to him, and they walked off together; that the report of a pistol was heard in a short time, and the prisoner returned to the still-house alone, having a wound in his leg, apparently made by a knife, and some scratches on his throat. There was no evidence, so far as disclosed by the bill of exceptions, of the circumstances of the killing, or of the conduct or condition of the parties at the time of the killing.

The prisoner offered to prove that the deceased, when starting to the still-house, said that he intended to kill the prisoner, and used these words: "When you hear from me, you will hear that him or me is dead." The state objected to the admission of this evidence, and the court sustained the objection, because it did

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not appear that these declarations or threats had been communicated to the prisoner.

The general rule is, that threats of personal violence made by the deceased against the prisoner, and not communicated, are not admissible in evidence, unless they form part of the *res gestæ*. *Powell v. The State*, 19 Ala., 577; *Carroll v. The State*, 23 id., 28; *Dupree v. The State*, 33 id., 380. It is impossible to define accurately the declarations which should be treated as parts of the *res gestæ*. The main facts in this case are the killing, and the circumstances attending it. Declarations coincident with these in point of time, whether made by the deceased or by the accused, would certainly be admissible. It is not the point of time at which the declarations were made, so much as their connection with the main fact, that determines the question of admissibility. *Goudy v. Humphries*, 35 Ala., 617. If they are cotemporaneous with the main fact, connected with it, and elucidate it, or the state of the party's mind, when that is material, at the time of the happening of the main fact, they are admissible. Their weight as evidence must be determined by the jury. They are not admissible to palliate or excuse a murder or a killing, shown by other evidence to be felonious. They are admissible only to show the mental *status* of the deceased, and his motive in going to the still-house and in inviting an interview with the prisoner. If there is no evidence of the facts attending the killing, this evidence may enable the jury to determine who was the aggressor, and may properly generate a doubt of the guilt of the accused. *Campbell v. The State*, 16 Ill., 18; *People v. Scoggins*, 37 Cal., 677. It should have been admitted, and the jury permitted, under proper instructions, to determine its value. Such evidence is of little value, if it is admissible, when the prisoner has provoked the affray, or when it affirmatively appears that the deceased was not in a condition to execute his threat or was making no effort to do so. *Carroll v. The State*, 23 Ala., 28.

The declarations or threats made by the deceased to Hudson and others, were properly rejected. They do not form part of the *res gestæ*, and are not cotemporaneous with it. The threats made to Cassey Speigle, as we construe the bill of exceptions, were made when the deceased was starting to the still-house, on the afternoon of the killing, and were admissible under the facts recited in the bill of exceptions, on the same reasoning on which



the declaration of a party leaving home, as to his destination and the objects he has in view, are received. *Pitts v. Burroughs*, 6 Ala., 733.

4. The charge requested, as to the weight or value of admissions or confessions as evidence, is abstract, so far as the bill of exceptions discloses. It does not appear that any admission or confession of the prisoner was given in evidence, and the court might well have refused, on this ground, to give the charge. The rule settled by this court is, that admissions made by a party to a civil proceeding (and confessions in a criminal case, as far as their weight as evidence is concerned, stand on the same footing) deliberately made and precisely identified, are often most satisfactory evidence; but that evidence of mere verbal admissions, unsupported by any other evidence, should always be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Wittick v. Keiffer*, 31 Ala., 199; *Garrett v. Garrett*, 29 id., 439.

The bill of exceptions does not disclose what was the evidence of the witness Johnson, nor that there was any evidence he had made contradictory statements, or statements variant from the evidence he gave. The charge asked was not warranted by any fact disclosed in the bill of exceptions; and for this, if for no other reason, it was properly refused. The other charges requested were so framed as to have a tendency to mislead the jury, and were properly refused. The charges given were not excepted to, and are not subject to revision. For the error we have noticed, the judgment is reversed, and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

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#### HORBACH vs. STATE.

(43 Tex., 242.)

**HOMICIDE:** *Evidence of character of deceased — Practice — Right of peremptory challenge — When to be exercised.*

On a trial for felonious homicide, where the defense is that the killing was done in self defense, it is competent to prove the general character of the deceased for violence, and his habit of carrying arms, where such evidence will tend to explain the actions or conduct of the deceased at the time of the killing, and the intent of the respondent.

On a trial for felonious homicide, evidence of the general reputation of the deceased for violence, or of his habit of carrying dangerous weapons, is not admissible until some acts or conduct on the part of the deceased at the time of the killing have been proved, which such evidence will tend to illustrate or explain.

Where there was evidence that at the time of the killing, the deceased grossly insulted the respondent a number of times without any provocation, and that when respondent asked him what he meant, he put his hand behind him as if to draw a pistol, when respondent shot him, it was *held* admissible to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons.

Under the statute in Texas, after a juror has been accepted and impaneled, the right of peremptory challenge is gone.

ROBERTS, C. J. The defendant was indicted for the murder of H. K. Thomas, found guilty of murder in the second degree, and his punishment assessed at six years in the state penitentiary.

The facts necessary to be mentioned to present the errors, on the trial complained of, were, that Horbach and Thomas were perfectly friendly up to the time of the difficulty, which happened about eleven o'clock at night, in a "sample room" in the city of Dallas, where and when there were present Boyle, one of the proprietors, and Duckworth, the bar-keeper, both of whom were behind the counter; Shock and Wilson, who were outside of the counter, as were also Horbach and Thomas, both of whom were somewhat intoxicated, and had taken, together with others, two drinks of spirits not long before the difficulty arose. Four of them had just played a game of pool, in which Thomas had lost, and treated the others. Upon asking his bill of the bar-keeper, he was told that he owed for two rounds of drinks, Horbach being then at the front of the store. Thomas said he owed no such damned thing. The bar-keeper said, "all right, Harvey," and Thomas paid for one round of drinks, and said if any one said he owed for two rounds, he was a damned liar. The defendant then came in singing and dancing, with a watering-pot in his hand, and put it on the counter, when Thomas asked him if he (Thomas) owed for two rounds; and Horbach said, "Yes." Thomas said, "It is a God damned lie," and taking the watering-pot, threw it down violently and mashed it. Up to this point there is no material difference in the testimony of the witnesses, but as to the balance there were some differences, which are attributable, partly at least, to two being behind the counter and

two being in front of the counter. That of the two in front, Shock and Wilson, was most favorable to the defendant, and was in substance, that Thomas told Horbach that "he was a damned lying son of a bitch," when Shock stepped up and told him that he (Shock) owed for the drinks. Thomas replied, "that is too thin," and told him to go away; and turning to the defendant told him again, whoever says that he owed for two rounds is a damned lying son a bitch, at the same time gesticulating violently with his right hand, touching or striking Horbach on the breast. Horbach said, "then you don't owe it?" Thomas again said to Horbach, "you are a damned lying son of a bitch," still gesticulating as before, in a violent, angry manner. Horbach said, "what do you mean?" perhaps twice. Thomas still repeating his accusations and gesticulations, when finally stepping back his right foot, threw his right hand behind him, pushing back the skirt of his coat (one of the witnesses says as if to draw a pistol), when instantly Horbach presented his pistol with both of his hands, and firing, shot Thomas in the head and killed him. Shock says that, being behind Thomas, he was shaking his head at Horbach; Wilson says that, during the altercation, he went into the front room, turned down some lights, came back, put some money in the safe, went behind the bar, and was talking to the bar-keeper about closing up, when the firing took place at the south end of the counter, the said witness being at the north end, and the counter being so high that he could not see the movement of the parties' hands in front of it. Shock went for a doctor. Wilson left the house, as did defendant, who was arrested that night in Wilson's room. There was evidence that Bogle and Duckworth were more friendly to Thomas than to Horbach. The doctor came and found no weapons on Thomas, and there was no further evidence as to whether he had weapons or not when he was shot.

There is no intention here to give the least intimation of opinion as to the weight of this evidence, as establishing one conclusion or another in reference to the guilt or innocence of the defendant. It is collated simply to show that there was evidence tending to prove one of two conclusions leading to different results, either that Horbach shot Thomas from a sudden motive of revenge for an unprovoked and gross insult, or under the belief that the gross insult was then being followed up by the act

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of making a deadly assault upon him with a weapon, endangering his life. The facts tending to the establishment of the latter conclusion (to what extent, it is immaterial to consider now) were, that Thomas, having a dispute with the bar-keeper about his liquor bill, became angry, and without any apparent cause, turned the controversy about it from the bar-keeper to Horbach. The bar-keeper, Shock, and Horbach, all tried to pacify him, and let him have his own version of the matter. Still he persisted in fastening the controversy on Horbach, who was not concerned in it and was not even present when it commenced. Horbach treated the matter lightly at first, and when all the means that were tried could not divert him from making the issue with Horbach, he commenced treating the matter seriously, and asked Thomas what he meant. Thomas stepped back his right foot, and threw his hand behind him as if to draw a pistol. It may be a significant fact, as tending to show the known character of Thomas, that the persons there, seeing the matter becoming serious, did not interfere, except that Shock, having been once rudely repulsed by Thomas, stood off at some distance shaking his head at Horbach. This may bear two constructions, either that they did not think it necessary to interfere, or that they did not think it consistent with their own safety to interfere with Thomas any further than had been done.

For the purpose of adding still further weight to the evidence, tending to the conclusion that Horbach acted under the belief, and had reasonable grounds, from the words and acts of Thomas then said and done, to believe that Thomas was in the act of making a deadly assault upon him with a weapon, the defendant, by his counsel, sought to prove by questions to witnesses, that Thomas was in the habit of carrying deadly weapons, and that Thomas, when intoxicated, was a quarrelsome and dangerous man. The questions, being objected to, were not allowed to be answered, to which rulings of the court defendant excepted, which appears in bills of exceptions in the record.

The question is, Was such evidence admissible for such a purpose as an element of defense?

"Evidence, in legal acceptance, includes all the means by which an alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.

"By competent evidence is meant that which the very nature

of the thing to be proved requires as the fit and appropriate proof in the particular case."

The thing sought to be proved in this case is, that Horbach had reasonable grounds to believe, and did believe, that Thomas then intended and was in the act of then attempting to kill him, by the use of a weapon. Now, supposing it to be proved that Thomas, being enraged and pressing the unprovoked quarrel upon Horbach until it became serious, and had arrived at a point where Thomas would either have to recede or follow it up with increased malignity, and just at that juncture he steps back and throws his right hand behind him, what other facts would be required as peculiarly fit and proper to be known by Horbach to induce that reasonable belief? Certainly the most fit and appropriate additional facts that he could possibly know, tending to prove such reasonable belief, would be, that Thomas had a pistol on his person back where he put his hand, and that he was a man that would use it when mad and intoxicated, and would not likely back down from a difficulty that he had himself provoked. If Thomas was in the habit of carrying a pistol where he put his hand, it was not improbable that his friend Horbach, as well as others, knew it, and might infer from the motion of his hand the intention to draw it; and if his general character was that of a dangerous man when aroused with anger and excited with drink, Horbach might infer that Thomas intended to use the pistol on him when drawn. On the other hand, if Horbach knew that Thomas' general character was that of a quarrelsome man, with no force of character, not vicious and destructive in his nature, not likely to use weapons if he had them, and not in the habit of carrying them, then the inference might not be reasonable from his conduct that he intended then to draw and use a pistol.

Thus is it shown that these very facts, Thomas' character for violence and habit of carrying arms, with Horbach's knowledge of them, might determine his guilt or innocence in acting as promptly as he did. His intoxication, his anger, his persistently pressing the difficulty on Horbach without cause, his violent character, and his habit of carrying weapons, would all be appropriate and fit facts, if they existed, to throw light upon and give significance to his movement in stepping back and throwing back his hand. Taken separately and in the abstract, they

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may be meaningless, indifferent and immaterial, but taken together, they may be pregnant with meaning, as shown by the conduct of the two witnesses, Wilson and Shock, who saw Thomas' motion of his body and of his hand. A man's character for violence, dependent upon his irascible temper, overbearing disposition, and reckless disregard of human life, is as much a part of himself as his judgment and discretion, his sight or hearing, his strength, his size, his activity, or his age, any one of which may become a material fact to give a correct understanding of his conduct and the intention with which an act is done by him, and are therefore part of the *res gestæ* when pertinent to the act sought to be explained. Their office in evidence is adjective, as auxiliary to a substantive fact to which they are pertinent, and without which they are irrelevant and immaterial. They are helps to the understanding in construing human conduct. The mind cannot reject or disregard them. They, and all like helps, ever have been, and ever will be, elements in the formation of belief as to what a man designs by an act to which they are pertinent. Practically we know that men generally, who are assailed with violence, act in defending themselves with promptness and force in proportion to the violent and desperate character of their assailant. It behooves them so to do for their own safety, because it is known that such men who usually fight only with weapons, and usually have them ready for use, are not to be trusted to get an advantage in the combat.

If, then, the character of the assailant in any case has helped to form a reasonable belief in the mind of the assailed that his life was then in danger, when the acts alone would fail to do it, the jury should in some way be informed of the character of the assailant, as well as of his acts, to enable them to understand that the belief was a reasonable one. Otherwise he might act in his defense on such reasonable belief, and the jury, not helped by a knowledge of the assailant's character to understand the import of his acts, of which they were informed, would find him guilty of murder, because of his having acted without reasonable grounds for believing that his life was then in danger, when in fact he had such reasonable grounds of belief, did believe it, and acted on such belief.

This being sometimes an important fact, necessary to be known

by a jury to enable them to come to a proper conclusion as to the state of mind of the accused just at the time when he killed the deceased, how and under what circumstances is it admissible in evidence? It is laid down as the rule at common law, as practiced in England and most of the older states of the American Union, that it must be made to appear, if at all, in the transactions immediately connected with the killing as part of the *res gestæ*, as it is termed, and to be deduced therefrom rather than to be proved as a distinct fact.

In an old settled country, where there is little change of population, this fact would generally be known to a jury without being proved as a distinct fact, whereas in newly settled countries, it might not be. Formerly it was the rule to get jurors from the vicinage who knew the parties and the transaction. Now, the very opposite is the rule. There are various other reasons arising out of the state of society and habits of the people in different countries and at different periods, which would make it important that this fact, when pertinent, should be made to appear as a distinct fact, as explanatory of the acts and intentions of the parties concerned, in order to arrive at the truth. In an early case in North Carolina, it was said, in speaking of the common law (in a case where it was held that the proof of the character of the deceased for violence was admissible as a distinct fact), that it is a "system which adapts itself to the habits, institutions and actual conditions of citizens, and which is not the result of the wisdom of any one man in any one age, but of the wisdom and experience of many ages of wise and discreet men." *State v. Tuckett*, 1 Hawk's L. & Ch. (N. C.), 217.

In an early case in Alabama, evidence of the general character of the deceased was held to be admissible. Chief Justice Lipscomb (who so long adorned our court also as associate justice), in delivering the opinion, said in very strong language, "If the deceased was known to be quick and deadly in his revenge of insults, that he was ready to raise a deadly weapon on every slight provocation; or, in the language of counsel, his 'garments were stained with many murders,' when the slayer had been menaced by such an one, he would find some excuse in one of the strongest impulses of our nature in anticipating the purposes of his antagonist. The language of the law in such a case would be, obey that impulse to self-preservation even at the hazard of

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the life of your adversary." *Quesenberry v. The State*, 3 Stew. and Port., Ala., 315-6. In the same case it is said that, "there can be no doubt but that when the killing has been under such circumstances as to create a doubt as to the character of the offense committed, that the general character of the accused may sometimes afford a clue by which the devious ways by which human action is influenced may be threaded and the truth obtained." These views of the law are quoted and adopted with numerous reasons for their correctness by Justice Lumpkin in the case of *Keener v. The State*, 18 Ga., 221; *Monroe v. The State of Georgia*, 5 id., 90.

In the case of the *State of Missouri v. Keene*, 50 Mo., 358, the court say, "where homicide is committed under such circumstances, that it is doubtful whether the act was committed maliciously, or from a well grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had reasonable cause to apprehend great personal injury to himself." This was said in reversing a conviction for murder, because the court had excluded evidence offered that the deceased was a quarrelsome, dangerous, and desperate man, and in the habit of carrying weapons, as was done in this case. See also *The State v. Hicks*, 27 Mo., 590.

The same doctrine was announced in the state of Minnesota in the case of *The State v. Dumphrey*, 4 Minn., 446, and also in the State of California, 10 Cal., 309, in the case of *The People v. Murray*.

In the case above quoted from Minnesota, it is said: "The character of the deceased *per se* can never be material in the trial of a party for killing, because it is as great an offense to kill a bad man as it is to kill a good man, or to kill a quarrelsome and brutal man as it is to kill a mild and inoffensive man.

The principle upon which this testimony is alone admitted arises from some peculiar condition in which the facts of the killing leave the crime. If the facts as established free the case from uncertainty and doubt, and leave the killing an act of premeditated design on the part of the defendant, the quarrelsome character of the deceased can in no manner change the nature of the offense; but if circumstances surround the transaction which leave the intention of the defendant in committing the crime

doubtful, or evenly balanced, or in any manner indicate provocation on the part of the deceased, testimony of the quarrelsome character of the deceased would then become sufficiently part of the *res gestæ* to be admitted to explain or throw light upon the matter. *State v. Dumphrey*, 4 Minn., 445-6.

It may be deduced from these authorities that the general character of the deceased for violence may be proved when it will serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved, before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection, when offered in evidence, would not be error; and that, if rejected when a proper predicate has been established for its admission, it is held error. See *Irvin v. The State*, decided this term. This results in what has been previously attempted to be developed, that the general character of the accused for violence should be allowed to be proved; not as a substantive fact, in whole or in part abstractly constituting a defense, but as auxiliary to, and explanatory of, some fact or facts proved to have occurred at, and in connection with the killing, which tend to establish a defense when thereby aided by furnishing reasonable grounds for the belief on the part of the slayer that he is then in immediate and imminent danger of the loss of his life from the attack of his assailant. It is observable in most of the cases, that it is said that the evidence of character for violence is admissible in a doubtful case. It can hardly be meant by this, that it is admissible only in a doubtful case of guilt; for if that is doubtful, there is no need of proof of character or anything else to help out the defense. 1 Whart. Crim. Law, sec. 644. The explanation, it is submitted, is that the person killing is presumed to have committed murder by the act of killing, and in arraying the facts to establish that he acted in self defense, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained, and construed more favorably for the accused by adding to it the proof of character of the deceased for violence, then such proof is admissible. Whart. Crim. Law, sec. 641, and cases cited.

The same rule would apply to the proof of the deceased's habit of carrying arms when pertinent. *Id.*

It would be easy to cite authorities opposed to the admission

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of such proof upon any condition or under any circumstances as part of a defense. 3 Greenl., sec. 27, and note; 1 Whart. Crim. L., sec. 641, and note.

Our Criminal Code provides for the admission of the proof of the general character of the deceased, as a violent or dangerous man, when it has been proved that he had previously made threats against the life of the defendant, which threats are declared to be admissible, but not to be regarded as affording a justification for the offense, unless it be shown that at the time of the homicide the person killed, by some act done, manifested an intention to execute the threat so made." Paschal's Dig., art. 2270.

Here the principal object is to provide for the admission of threats, and incidentally thereto is permitted the proof of the violent character of the deceased, to give force to them, and both together, when proved, serve only to explain the object of an act done by the deceased at the time of the killing.

The main object of this provision of the code was to settle a long continued controversy in the courts of this state as to whether previous threats should be admitted at all, and if admitted, what their force and effect should be; and whether or not a predicate should be first established for their admission, by the proof of some act of the deceased which they would give point to and explain.

This affirmative provision for the admission of the proof of the character of the deceased, as a dependent incident to threats that have been admitted to be proved, should not be held to operate as an exclusion of the proof of character in any and all other instances wherein it might be equally applicable and pertinent.

In providing for the admission of previous threats, it simply insured also the admission of that which was necessary to give them their proper weight and force, without prescribing anything either for or against the admission of the proof of the violent character of the deceased, in aid of any other fact besides threats.

This provision of the code, it is believed, is a reenactment of the rules relating to threats, as adopted and practiced as part of the common law in this state before the adoption of the Penal Code. *Lander v. The State*, 12 Tex., 474, 484.

If our laws sanction the proof of the violent character of the deceased in aid of threatening words, it is difficult to see why it should not be equally allowed to be proved in aid and explanation of the threatening acts done by the deceased at the time of the killing.

It is scarcely necessary to go into an explanation of the condition of things in this country, which imperatively requires the admission of the proof of the character of the deceased for violence, in order to attain the ends of justice in the administration of the criminal law. It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols belted behind them and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly rencounters for causes and provocations that would be regarded as utterly trivial by peaceable men, and that if one of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean, that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons would suggest no such thought, and in such case, the pistol would have to be drawn and exhibited before any such thing would be conceived, unless there had been some very extraordinary provocation.

This state of things here is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject, and men act upon it, and are compelled to act upon it, in defending themselves from deadly assaults.

It is true, the law requires a party killing to act under the responsibility to himself of acting soon enough to save himself from loss of life or from serious bodily injury, such as mayhem on the one hand, and on the other, the risk of exercising firmness and discretion to wait long enough until some act is done by the deceased, at the time of the killing, by which the jury trying the case will be satisfied, considering all the surrounding circumstances and the parties concerned, that the defendant had reasonable grounds to believe, and did then believe, that he was then in imminent and impending danger of being murdered or

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maintained by his assailant. Paschal's Dig., art. 2226. And, although the attack may be unlawful and violent, if the act done by the deceased indicated a "less degree of personal injury than killing and maiming," then, before the killing can be fully justified or excused, it must be shown that "all other means were resorted to for the prevention of the injury, and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." Paschal's Dig., art. 2228. This distinction and difference in the rule as made by our code, depending upon the degree of injury intended by the deceased as manifested by his acts, is very important, practically to be observed.

It may avoid repetition by noticing here that this distinction was not properly observed in the otherwise very excellent charge of the court below, which is as follows: "The defendant may also justify himself in the killing by evidence showing: 1st, that the deceased made an unlawful and violent attack upon him; 2d, that the attack so made was of such a nature as to have produced in the mind of this defendant a reasonable expectation or fear of death or some serious bodily injury; 3d, that this defendant resorted to all other means to prevent the injury; 4th, that deceased was killed while in the very act of making such unlawful and violent attack. And unless all four of these propositions affirmatively appear in evidence, the defendant cannot be justified on the ground of an unlawful and violent attack upon his person."

The second proposition above quoted is not contained in the article of the code to which the other three relate (art. 2228, Paschal's Dig). By this article, 2228, it is intended to provide the rule that where any other unlawful and violent attack is made than one in which the acts of the deceased manifest the intention to murder or maim (or to commit rape, robbery, arson, or theft at night), defendant is required to resort to all other means before killing his assailant for the prevention of the injury, because in such an attack, it is presumed that there may be time and opportunity to resort to other means. But, as provided for under the preceding article, 2226, where, at the time of the killing, "some act has been done by the deceased showing evidently an intent to commit such offense" (murder or maiming), then and there, in that event, the party thus attacked need not resort to

other means before killing his assailant, because it is presumed in such a case that the party's safety depends upon his prompt action in killing his adversary. Thus, when an unlawful and violent assault is committed, the degree and character of injury intended by the assailant, as then indicated by his acts then done, is made the test of whether the party attacked may at once kill his assailant, or must resort to all other means for the prevention of the injury before killing him. This confusion from blending the two rules might have been obviated by giving the 3d charge asked by defendant's counsel, which was refused by the court only upon the ground that it was deemed to have been "substantially given."

To return to the evidence excluded, it is proper to notice, on account of the intimate relations between threats and the general character of the deceased, that by our code threats are admissible as independent evidence, without first having established a predicate for their admission by the proof of acts done at the time of the killing, to which they might give additional force, subject to having their effect as evidence subsequently explained away and destroyed by the charge of the court in the absence of evidence tending to prove such acts.

In the case of the proof of general character of the deceased, there must be a predicate established by evidence already submitted, tending to prove threats of the deceased, or some act done by him at the time of the killing, which it would aid or give force to, as heretofore explained; and when admitted, it would be proper and not charging on the weight of evidence, for the court to explain to the jury the object of its admission as auxiliary and explanatory of the threats or acts to which it was pertinent, and to be not of itself independent evidence of a defense.

The evidence exhibiting the acts of the deceased at the time of the killing constituted a predicate for the admission of the proof of the general character of the deceased as a violent and dangerous man, and that he was in the habit of carrying weapons, and upon that ground, such proof should have been admitted.

There is also a bill of exceptions in the record, by the defendant as to the ruling of the court in the selection of the jury, which recites the facts as follows:

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"After the state had passed severally upon Mitch. Gray, R. H. Lindsey and James H. Davis, and before the jury had fully been made up, the court permitted the district attorney to challenge each of said jurors peremptorily, and had them stand aside, to which defendant excepts." The ruling of the court was, that the state or defendant could challenge any juror, although accepted, when a new juror was chosen, until their challenges respectively were exhausted.

Upon the trial of a capital offense, a special *venire facias* is issued for persons, not less than thirty-six nor more than sixty, for the purpose of forming a jury. Pasch. Dig., art. 3016, and following.

It is further provided that, "in forming the jury, the names of the persons summoned shall be called in the order they stand upon the list, and, if present, shall be tried as to their qualifications, and unless challenged, shall be impaneled." Pasch. Dig., art. 3024. By this we understand that they are to be challenged, either for cause or peremptorily, severally, as each one is determined by the court to be a qualified juror, which is to be continued, one by one, until the jury is fully formed to the number of twelve. We know of no law or established practice under the law, which sanctions the peremptory challenge of a juror by either party when thus placed on the jury, whether it is full or not. There may be discretion in the court for excusing or standing aside a juror after he is thus selected, for some good cause shown at the time why the juror cannot or ought not to serve on that jury. We do not think, therefore, that the mode of selecting the jury that was adopted in this case is warranted by any law of this state.

For the several errors that have been pointed out, and particularly for that of excluding the evidence offered to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons, the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

NOTE.—On the trial of an indictment for homicide, evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous and savage man, is inadmissible. If the offer be general, and not connected with the defendant's *status* at the time, the testimony must necessarily be excluded, for it would be a barbarous thing to allow A. to give as a reason for his killing B., that B.'s disposition was savage and riotous. When, however, it is



shown that the defendant was under a reasonable fear of his life from the deceased, the deceased's temper, in connection with previous threats, etc., is sufficiently part of the *res gestæ* to go in evidence as explanatory of the state of defense in which the defendant placed himself." 2 Whart. Crim. Law (7th ed.), § 641.

In *State v. Bryant*, 55 Mo., 75, the evidence tended to show that the deceased, at the time he was killed, had grappled the defendant, and was trying to pull a slung shot out of his pocket. The defense offered to show that the deceased was a desperate and dangerous man, and the evidence was excluded. *Held*, error. The court say: "Whilst it is perfectly true that the character of the deceased affords no justification, and will not even palliate the crime, where it appears that the defendant was the aggressor, and provoked the altercation, still it frequently becomes of great importance in determining the degree and quality of the offense. A bad man, as well as a good one, is equally under the protection of the law, but in a case of homicide, when it is doubtful whether it was committed with malice or from a well grounded apprehension of danger, it is necessary to take into consideration the fact that the deceased was desperate, violent or dangerous. A peaceable, well disposed man, although in anger, might excite very little fear, whilst the menacing attitude of a cruel, vindictive and desperate person would cause the greatest apprehension, and justify a line of action in the one case which would be wholly unwarrantable in the other. It is therefore evident that the characteristics of the deceased, with the restrictions placed upon them by the court, did not meet the case. A man may not be peaceable, and still have nothing dangerous about him; he may be the very reverse of quiet, and yet not in any way dangerous or desperate. The very traits of character, which it was important to show as throwing light upon the character of the offense, were the very ones which the court would not permit to go to the jury.

In *Monroe v. State*, 5 Ga., 85, where it was doubtful whether the killing was malicious or in self defense, the court rejected evidence which was offered on the part of the defense, which went to show that the deceased was a violent, rash and bloody minded man, reckless of human life, in the habit of taking advantage of his adversaries in personal contests, and that the prisoner was well acquainted with his character in this particular. The rejection of the evidence was held error. The court say: "As a general rule, it is true that the slayer can derive no advantage from the character of the deceased for violence, provided the killing took place under circumstances that showed he did not believe himself in danger. Yet in cases of doubt whether the homicide was perpetrated in malice, or from a principle of self-preservation, it is proper to admit any testimony calculated to illustrate to the jury the motive by which the prisoner was actuated." 3 S. & P., 398. And in this view, we think the evidence was improperly ruled out. Reasonable fear, under our code, repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order, and fatally bent on mischief; or is a man of Quaker-like mien and deportment? One who never strikes except in self-defense, and then evincing the utmost reluctance to shed blood? We apprehend that the imminence of the danger, as well as the chance of escape, will depend greatly upon the temper and disposition of our foe. In

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these cases, every individual must act upon his own judgment, and in view of his solemn responsibility to the law. If the assailant intend to commit a trespass only, to kill him is *manslaughter*; but if he design to commit a felony, the killing is *self-defense*, and justifiable. 1 Hawk. P. C., ch. 28, sec. 23; 1 East C. L., 272. Who, knowing the character of Kyd, the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery, or murder, or both, were contemplated?"

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PEOPLE vs. ALIBEZ.

(49 Cal., 452.)

HOMICIDE: *Duplicity.*

On a demurrer for duplicity to an indictment for murder, containing but one count, charging the murder of three persons, it was *held* that the count was bad as charging three offenses.

The murder of three persons constitutes necessarily three offenses.

WALLACE, C. J. The indictment, containing but a single count, charges that the defendant "unlawfully, and with malice aforethought, and in and upon P. Alibez, C. Alibez and R. Alibez, did, wilfully, unlawfully, maliciously and feloniously administer a poisonous drug, known as strychnine, with intent them, the said P. Alibez, C. Alibez and R. Alibez, to unlawfully and maliciously kill and murder, and did maliciously, unlawfully and feloniously then, and there, by administering said poisonous drug, to wit, strychnine, unlawfully, premeditatedly and with malice aforethought, kill and murder the said P. Alibez, C. Alibez and R. Alibez, contrary to the form, force and effect of the statute," etc. The defendant filed a demurrer to the indictment, on the ground that it charges more than one offense; the demurrer was overruled. A trial was subsequently had upon a plea of not guilty, and a verdict of guilty of murder in the first degree having been found by the jury, the defendant moved the court in arrest of judgment, upon the ground that more than one offense had been charged in the indictment. The motion was denied, and judgment having been rendered upon the verdict, the case is brought here upon appeal.

The statute (Penal Code, 954) under which the proceedings in question were had distinctly provides, that the indictment "must charge but one offense," while it is self-evident that the

indictment here, charging the defendant, as it does, with the murder of three persons, necessarily charges three offenses. The slightest examination of the statute upon the part of the district attorney, in the first instance, would have prevented such a blunder. Even if he had overlooked it, however, at the outset, it would seem that the demurrer and motion in arrest of judgment subsequently made ought to have called it to his attention.

Judgment reversed and cause remanded, with directions to the court below to sustain the demurrer to the indictment, and to dispose of the prisoner, with a view to submitting the charge to another grand jury.

NILES, J., did not express an opinion.

NOTE.—In *Clem v. State*, 42 Ind., 420, the same question arose and was decided differently. In that case, the prisoner was indicted for murder for killing one Jacob Young, by a gunshot wound. She pleaded a former acquittal. The plea set forth that she had formerly been tried on an indictment for murder, charging the killing of Nancy Jane Young by a gunshot wound, and that she was acquitted on that trial of murder in the first degree, and convicted of murder in the second degree, and that judgment was rendered upon the verdict. The plea further set forth that the two indictments charged identically the same offense, and (inferentially) that the same act caused both deaths. To this plea the state demurred, and the demurrer was sustained and the plea overruled, to which the defendant excepted. The defendant then pleaded not guilty, and on a second trial, was convicted of murder in the second degree. The case was taken by appeal to the supreme court, where it was held that the overruling of the plea was error, and that "the killing of two or more persons by the same act constituted but one crime." In support of this proposition, the court cite *State v. Darrow*, 2 Tyler, 387, an assault and battery case; *Ben v. State*, 22 Ala., 9, a case of poisoning, and various other authorities.

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### SAUNDERS vs. PEOPLE.

(29 Mich., 269.)

#### HOUSE OF ILL FAME: Evidence—Pleading.

In an information for letting a house for the purposes of prostitution, the statement of the locality of the house need not be more precise than in informations for burglary or arson.

Time in an information, where it is not matter of description, need not be proved as laid.

It is error to allow a jury to infer a fact, of which there is no evidence.

In a prosecution for letting a house for the purpose of a prostitution, it is admissible to prove the reputation of the lessee, and of girls who were seen in the house.

Testimony which shows that the lessee of a house and women who had been seen in the house were reputed prostitutes is not, of itself, sufficient to establish the fact that the house is kept or used as a house of prostitution.

EXCEPTIONS from Recorder's Court of *Detroit*.

*Isaac Marston*, Attorney General, for the people.

*Browse T. Prentis* and *George H. Penniman*, for the respondent.

CAMPBELL, J. Respondent was convicted under section 7702 of the compiled laws, of letting a dwelling house, "knowing that the lessee intended to use it as a place of resort for the purpose of prostitution and lewdness." The same section contains a prohibition and penalty against knowingly permitting a lessee to use a dwelling house for such purposes, but the information was confined to the offense of letting with guilty knowledge.

The information was objected to as not describing the precise locality of the dwelling; and objection was also made to the proof of a lease dating back more than a year before the time set forth in the information.

We do not think the locality needs any more precise description under the usual practice. The name of the lessee is given. There has always been much looseness in the description of places in indictment, involving crimes connected with habitations. Indictments for burglary or arson should contain as accurate references to the place of the offense as the purposes of this statute require. But such a description as is given here would be sufficient at common law in those cases.

It was certainly a stretch of propriety to give a date of leasing so very remote from the true one. But where a date is not given as a matter of description, the practice has allowed the time to be alleged without any reference whatever to the truth. We are unable to say that the variance in the present case is such as to affect the legality of the proceedings.

The prosecution proved the lease by the lessee, Mary Lavall, who denied, however, that there was any improper use or intent. She was allowed, under objection from respondent, to state the amount of the rent. We can see no reason why any of the terms of the lease should be excluded. But in charging the

jury, the court allowed them to consider the amount of the rent as having a bearing on the likelihood of such a rate being paid, except for improper purposes. This was clearly error, as there was no proof introduced to create a standard of comparison; and it would be extremely dangerous to leave juries at liberty to derive conclusions based upon nothing but conjecture.

Objection was also made to the introduction of testimony tending to prove that Mary Lavall was a woman of ill repute, and had kept houses of ill repute, and that girls seen in the house were reputed to be prostitutes.

It is true that no one can be convicted upon evil repute, without proof of actual misconduct. Persons and houses may bear an ill name, and yet there may be nothing known against them which would justify the interference of the law. And the respondent could not be lawfully convicted on such testimony, without evidence of some act which comes within the statute.

But the fact that certain proof offered is not sufficient to make out a case is no reason why it should not be received to make out a part of it. It was necessary in this case, not only to prove the intended and actual use of the dwelling for the unlawful purpose, but to show that the respondent knew it was so intended when he first leased it. It is not likely that persons who come to an understanding on such a purpose will express it in writing, or even express it at all. Criminal agreements are often, if not usually, made tacitly. They can only be proved by circumstances. If a person leases a house to a woman of ill repute, and knows of that repute, and the house is thenceforth used for unlawful purposes, and such use is known to him, these facts must be regarded as having a tendency to create belief in his guilty knowledge, or, at all events, as bearing upon that fact. All the facts cannot be brought in at once. Each is proved separately, and the order of proof must be left somewhat discretionary. If facts enough are not shown, the respondent cannot be convicted, but no relevant fact can be excluded merely because it does not by itself prove the whole case. This testimony was all relevant, and therefore properly received.

We think, however, that an error was committed in permitting a conviction when there was no evidence of the main fact.

The attention of the court was called to the question, and the judge was asked to charge that there was no evidence that de-

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tenant knew the house was resorted to, or that it was resorted to in fact, for the purpose named, but this was refused.

The testimony tended to show nothing more than the evil reputation of the lessee, and of other women who had been seen in the house. There was no evidence of any acts of lewdness committed there, and no evidence that men resorted there at all. If there had been proof that the house was resorted to by men as well as women of ill fame, the jury could draw any reasonable inference from such facts. But the law does not punish the mere letting of houses to bad characters. It is the use of the house, and not merely the reputation of its inmates, which the particular statute under consideration was intended to reach.

Whatever may be the probability that the house will be improperly used when in such hands, yet there must be clear proof of intent, to satisfy the law, and the fact of such use, from which in this case, the intent was sought to be derived, is not to be assumed without proof, direct or circumstantial. If the inmates commit offenses elsewhere, the landlord is not made responsible for what is not done on his premises, and the court erred in allowing the case to be disposed of without testimony tending to establish the misuse of the house.

We do not wish to be understood as holding that if there is clear proof of a letting with the distinct understanding that the house is to be used for unlawful purposes, any proof of actual use would be necessary. The crime may be complete at the time of the letting, and such is the meaning of the statute. But in the case before us, there was no proof of such design that could have sufficed without the evidence of the actual use, and therefore the evidence became essential.

Upon the other principal rulings of the court, so far as they are likely to be called for on another trial, the objections taken do not seem to be based upon any substantial variance between charges asked and given. The distinctions are over nice, and lacking in importance.

For the errors before noted, the conviction should be set aside and a new trial granted, and directions given to the court below accordingly.

COOLEY and CHRISTIANCY, JJ., concurred.

GRAVES, C. J., did not sit in this case.

SYLVESTER *vs.* STATE.

(42 Tex., 496.)

HOUSE OF ILL-FAME: *Evidence.*

Evidence of the general reputation of a house is admissible for the purpose of establishing its character as a house of prostitution.

Whether such evidence is sufficient standing alone to sustain a conviction, *quere.*

APPEAL from Criminal District Court of *Galveston* County. Tried below before the Hon. Samuel Dodge.

Mary Sylvester was indicted for keeping "a disorderly house for the purpose of public prostitution, and as a common resort for prostitutes."

On the trial, witness Drew testified that he knew the defendant, and her residence, in 1874; knew the general character and reputation of defendant to be that of keeping an assignation house; that he had been at the house of defendant and had met one woman there for a lascivious purpose. Defendant lived in Galveston city, near Schmitt's garden; saw two or three other women going out at the back door at the time.

Tim. Brown, James Baker, and four others, testified that they did not know where the house of defendant was situated as to the street, but it is situated in Galveston city and county; knew the general character and reputation of defendant's house to be that of an assignation house; and on cross-examination by defendant, witness stated that their information of general reputation was formed from talking with their associates and acquaintances, and what they heard them say.

This testimony was admitted over the objections of the defendant. Defendant was convicted, and appealed.

*Mills & Ferris*, for appellant.

*Frank M. Spencer* and *N. G. Kittrell*, for the state.

GOULD, J. The case of *Morris v. The State*, 38 Tex., 603, recognizes the admissibility of evidence of the general reputation of a house for the purpose of establishing its character as a house of prostitution. The admissibility of such evidence is supported by decisions of other courts. See *The State v. McDowell*, Dudley, S. C., 346; *The State v. Hurd*, 7 Iowa, 412. Wharton says: "Common reputation of the character of the defendants,



and the house which they kept, and of the persons visiting them is admissible." 3 Whart. Am. Cr. Law, sec. 2393.

It is believed to be well settled that the character of the occupants may be established by evidence of their general reputation. 2 Bish. Cr. Pr., sec. 93. Whilst it is true that the admissibility of such evidence as to the house is denied by some authorities (see *Com. v. Stewart*, 1 Serg. & Rawle, 342), we see no sufficient reason for departing from the ruling in *Morris v. The State*.

The case before us does not present the question of the sufficiency of such evidence alone to support a conviction. One witness testifies not only that the house was so reputed, but proceeds to state facts which show that he knew the base uses to which it was appropriated. Whatever doubt we might entertain of the sufficiency of evidence of the general reputation of the house, unsupported by other testimony to justify a conviction, we think the additional facts in evidence in this case were sufficient.

A distinction is made in the argument of counsel, between an assignation house and a house of prostitution. In the absence of evidence to the contrary, we think the jury were justified in inferring that the use of the house as an assignation house was by common prostitutes.

There was some evidence on behalf of defendant, to the effect that she lived a quiet, peaceable life, and that there was no noise or disturbance at her house. This may have been true, and yet the house have been "disorderly" in the meaning of the law. A house of prostitution is within the act, however quietly and peaceably it may be kept. The judgment is affirmed.

*Affirmed.*

# STATE vs. BOARDMAN.

(64 Me., 523.)

## HOUSE OF ILL FAME: Evidence.

Under a statute making the keeping of a house of ill fame resorted to for lewdness a common nuisance, "house of ill fame" means the same thing as "bawdy house." And the gist of the offense being the use of the house for lewd purposes, and not its reputation, evidence of the reputation of the house is not admissible.

In a prosecution for keeping a house of ill fame, evidence of the reputation of the women who frequent the house, and the character of their acts and conversation in and about the house, is competent.

In a prosecution for keeping a house of ill fame, the house must be proved to be a house of ill fame by facts, and not by fame.

DICKERSON, J. The defendant is indicted for keeping a house of ill fame, resorted to for the purpose of prostitution and lewdness. The offense charged is that of a common nuisance. The language of the statute is as follows: "All places used as houses of ill fame, resorted to for lewdness or gambling, for the illegal sale or keeping of intoxicating liquors, are common nuisances." R. S., ch. 77, § 1. Section 2 of the same chapter makes "any person keeping or maintaining such nuisance" liable to fine or imprisonment in the county jail.

The terms "house of ill fame" and "bawdy house" are synonymous. "A bawdy house," says Bouvier, "is a house of ill fame, kept for the resort and unlawful convenience of lewd people of both sexes." So Archbold defines a bawdy house to be a house kept for the resort and convenience of lewd people of both sexes. 1 Bouvier's Law Dic., h. b.; 2 Archbold's Crim. Prac. & Plead., 1667; Bish. Crim. Law (5th ed.) 1883; *McAllister v. Clarke*, 33 Conn., 92.

The common signification of the word corresponds with its technical meaning. "A bawdy house," says Worcester, "is a house used for lewdness and prostitution, a brothel." The idea conveyed by the term "house of ill fame," or its synonym "bawdy house" is that of a house "resorted to for the purposes of lewdness and prostitution." A "house used as a house of ill fame" is a house thus resorted to; it cannot be so used unless it is thus resorted to, and if it is resorted to for such purpose, it is "a house used as a house of ill fame," in the purview of the statute, though it may not have that reputation. The phrase, "resorted to for lewdness," contained in the statute, does not qualify, enlarge or change the meaning of the preceding clause in this case; the statute, in this case, has the same meaning and application without as with that phrase.

In order to make out the offense charged in the indictment, under our statute, it is necessary to establish two things; first, that the house was used as a house of ill fame; and second, that the defendant kept it. The gist of the offense consists in the

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use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it had any. The reputation of the house, under our statute, makes no part of the issue. Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill fame, and is inadmissible as mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance. 2. Whart. Crim. Law, § 2367; 3 Greenl. on Ev. (6th ed.), 186; 2 Bish. Crim. Proc., § 91. The judge in the court below erred in admitting such evidence.

We are aware that the court in Connecticut, in *Caldwell v. The State*, 17 Conn., 467, held that to support such an information, under the statute of that state, it is necessary to prove that the general reputation of the house was that of a bawdy house, and that it was such in fact. To establish the first proposition, the court in that case admitted evidence of reputation of the house, but distinctly say that such testimony would be clearly inadmissible to prove that the house was in fact a house of ill fame. We have seen that, under the phraseology of our statute, it is not necessary to prove the reputation of the house, and the case of *Caldwell v. The State*, 17 Conn., 467, thus becomes authority for excluding evidence of reputation in this case. 2 Bish. Crim. Proc., § 91.

Evidence of the reputation of the women frequenting the house, and the character of their conversation and acts in and about it is competent in such cases, as the judge ruled. *Commonwealth v. Kimball*, 7 Gray, 328; *Commonwealth v. Gan-nelt*, 1 Allen, 8.

The judge also properly overruled the defendant's plea. *Ware v. Ware*, 8 Me., 42; Public Laws of 1868, ch. 151, § 6.

*Exceptions sustained.*

APPLETON, C. J., WALTON, BARROWS, VIRGIN and PETERS, JJ., concurred.

The chief justice and concurring justices appear also to have assented to this note upon the case by

PETERS, J. The house must be proved to be a house of ill fame by facts, and not by fame.

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BAUMER *vs.* STATE.

(49 Ind., 544.)

INCEST: *Indictment — Joint offense — Effect of acquittal of one.*

Under the statute of Indiana against incest between step-son and step-mother, each must have knowledge of the relationship, and an indictment against the step-son which does not allege that the step-mother knew of the relationship is bad on a motion to quash.

Incest is a joint offense, and if one of the parties has been tried and acquitted, this fact, if pleaded, is a bar to the prosecution of the other party for the same offense.

DOWNNEY, J. This was a prosecution against the appellant for incest. The charge in the indictment is as follows:

"The grand jurors for said state of Indiana, impaneled, charged and sworn in the Wayne circuit court, to inquire within and for the body of the same said county of Wayne, upon their oath, charge and present that Arthur Baumer, late of said county, at said county, on the 30th day of May, A. D. 1874, did then and there unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Indiana."

The defendant moved the court to quash the indictment, but his motion was overruled, and he excepted. He then pleaded a special plea in bar, in which he alleged "that the said grand jury, which found and returned the indictment, at the November term, 1874, of the said court, also found and returned at the same time into said court as a true bill and indictment against Augusta Baumer, charging that she, the said Augusta, on the — day of May, 1874, at said county, did unlawfully have sexual intercourse with her step-son, Arthur Baumer (this defendant meaning), she, the said Augusta, then and there knowing that he, the said Arthur, was her step-son, which said Augusta Baumer so charged is the same Augusta Baumer named in the said indictment against this defendant, and the said Arthur Baumer named in the said indictment against the said Au-

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Augusta was and is this defendant, and the act of sexual intercourse charged in said indictment is the same act of sexual intercourse charged in this indictment against this defendant, and none other, and the offenses charged in the said two indictments so found and returned by the said grand jury were and are the same to all intents and purposes; and afterward, to wit, at the said November term of said court, the said Augusta Baumer, being arraigned in said court upon the said indictment found and returned against her as aforesaid, pleaded not guilty thereto, and the issue being joined in said cause between the state of Indiana and the said Augusta, the same came on for trial in said court, and was there tried by a jury duly impaneled in said court, and on said trial, it was proved by competent evidence, and beyond a reasonable doubt, that the said Augusta, at the time of the said alleged sexual intercourse, had knowledge of the relationship existing between her and the said defendant; that she was at said time the step-mother of the said defendant, and he was her step-son; and there was no evidence given on said trial proving, or tending to prove, that the said Augusta was, at the time of the said alleged intercourse, or at any other time, insane or of unsound mind, or incapable of understanding the criminal nature of said alleged act; and the said jury, having heard the evidence in the cause, and after due deliberation thereon, found and returned into said court their verdict in the words following, to wit:

"We, the jury, find the defendant not guilty." And thereupon the said prosecution against her was fully ended; wherefore the said defendant says that the state of Indiana ought not further to prosecute the said indictment against him, and he prays that he may be discharged therefrom.

The state demurred to this answer; the demurrer was sustained, and the defendant excepted. The prisoner then pleaded not guilty. The cause was tried by a jury. There was a verdict of guilty, with punishment of nine months imprisonment in the county jail. Judgment was rendered accordingly.

The errors assigned being in question, the action of the court in overruling the motion to quash the indictment, and in sustaining the demurrer to the answer. The statute on which the indictment is founded reads as follows:

"If any step-father shall have sexual intercourse with his

step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, or if any parent shall have sexual intercourse with his or her child, knowing him or her to be such, or if any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity, every person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be imprisoned in the state prison not less than two nor more than ten years, or may be imprisoned in the county jail not less than six nor more than twelve months." 2 G. & H., 452, sec. 45.

The section may be analyzed to advantage:

1. It declares that, "if any step-father shall have sexual intercourse with his step-daughter knowing her to be such," he shall be guilty. Here the step-daughter is not legally guilty of any crime. The step-father is guilty, if he have knowledge that she is his step-daughter, and this is so whether she has knowledge that he is her step-father or not. The crime is separate and several on his part.

2. "If any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship."

This language, it will be perceived, is quite different from the preceding. It is required that they shall have sexual intercourse together, and that they shall both have knowledge of their relationship. In this case, both parties to the act became guilty and liable to punishment. The crime is a joint one, and one of the parties cannot be guilty unless the other also is guilty.

3. "If any parent shall have sexual intercourse with his or her child, knowing him or her to be such." In this case, the parent is the only party made criminally responsible. The crime is the separate and several crime of the parent, while the child is not punishable at all. Applied to persons sustaining this relation to each other, the law is like it is with reference to the relation of step-father and step-daughter.

4. "If any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their consanguinity." Here, as under the second clause of the statute, the crime is joint. The parties must have intercourse together, with knowledge of their consanguinity.

The indictment in this case is on the second clause of the

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statute, and consequently we need only decide upon the proper construction of that part of the section. That its proper construction is that which we have already indicated, we think is reasonably clear, upon the language of the statute itself.

We are referred by counsel for appellant to, and cite in support of this construction of the statute, the following authorities: *Rich. Stat. Crimes*, secs. 702, 721 and 731; *The State v. Byron*, 20 Mo., 210; *Noble v. The State*, 22 Ohio St., 541; *Delaney v. The People*, 10 Mich., 241. In the last named case, the information was on a statute, the language of which, so far as it affected the case in judgment, was as follows: "If any man and woman, being married to each other, shall lewdly and lasciviously associate and cohabit together, \* \* every such person shall be punished," etc. It was held that the offense was joint, and that both of the parties must be guilty, or neither.

The indictment in the case which we are considering alleges only that the defendant "did unlawfully have sexual intercourse with his step-mother, Augusta Baumer, then and there knowing the said Augusta Baumer to be his step-mother." Such an allegation of the crime might have been good, according to our view of the statute, had the indictment been against a step-father, or a parent, where the guilty participation of the other party to the act is not a necessary ingredient of the crime. But, as between step-mother and step-son, where the crime is joint, and where both must be guilty, or neither, we think it is fatally defective.

It follows, from what has already been said, that the court erred in sustaining the demurrer to the answer of the defendant, setting up the acquittal of Augusta Baumer, the step-mother, and other party to the alleged joint crime.

In addition to the above cited authorities, we may, on this point, refer to the following: *State v. Tom*, 2 Dev., 569; *The King v. The Inhabitants*, etc., 13 East, 411; *Turpin v. The State*, 4 Blackf., 72.

In the last named case, which was a prosecution for riot against three persons, upon the trial, two were acquitted, and one found guilty. It was held that upon this verdict, no judgment could be pronounced against the defendant found guilty. In the case of *Delaney v. The People*, *supra*, it was held that the parties must both be joined as defendants in the same information, but we do not care to lay this down as law. Whether they be prosecuted in



the same indictment or not, the crime must be charged as a joint crime. They may be tried separately, and one may be convicted and sentenced before the other is tried. If one be tried and acquitted, the other must be discharged; and, it is said in the Michigan case, that if one be tried, convicted and sentenced, and the other tried and acquitted, this will, *ipso facto*, render the first conviction void.

The judgment is reversed, and cause remanded, with instructions to quash the indictment, and discharge the defendant.

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PEOPLE *vs.* WILSON.

(49 Cal., 13.)

INSANITY.

Where insanity is relied upon as a defense to a criminal charge, the burden of proof is on the respondent to establish his insanity at the time of the act; but such insanity may be established by a preponderance of testimony and is not required to be proved beyond a reasonable doubt.

BY THE COURT.—Insanity of the defendant at the time of the commission of the alleged offense was one of the defenses relied upon at the trial. On this point the court charged the jury: "You cannot acquit him on the ground of insanity, because a doubt may arise in your minds on the question. His insanity must be made to appear to you beyond a reasonable doubt." Some of the authorities hold this to be the correct rule; but in this state the contrary rule has been settled by several decisions of the court, the latest of which was in the case of the *People v. McDonnell*, 47 Cal., 134. In that case we held that while the burden of proof is on the defendant to establish the insanity, it is sufficient to prove it by a preponderance of evidence, in other words, that "insanity must be clearly established by satisfactory evidence."

Judgment reversed, and cause remanded for a new trial.

WALLACE, C. J., concurring. As to whether a prisoner relying upon the defense of insanity at the time of the commission of the act charged against him as a crime, may rest upon mere preponderating evidence of the fact of insanity, or must

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go further and establish his alleged insanity beyond a reasonable doubt, is a question upon which the authorities are in conflict. In view of the notorious facility with which this defense is often availed of to shield the guilty from just punishment, I should, if the matter were *res integra* in this court, be inclined to adopt the latter rule. But in the case of *The People v. Coffman*, 24 Cal., 230, the question was thoroughly considered here, and it was held that insanity might be established in a criminal case by the same amount of evidence by which it might be established in a civil action involving the question, that is, by mere preponderating evidence; and, upon the authority of that case, I concur in the judgment in this case.

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SULLIVAN vs. PEOPLE.

(31 Mich., 1.)

INSANITY: *Practice — Remark by court in presence of jury.*

Evidence that the respondent was insane "on the night of the third or the morning of the fourth of January," when this is all the evidence that he was ever insane, and where there had been evidence that he was never insane, has no tendency to prove that he was insane on the morning of the second of January.

An improper remark by the court, adverse to the prisoner in the presence of the jury, will be considered on writ of error as though it were a part of the charge.

The court has no right to say in the presence of the jury that it was the duty of the prisoner to bring forward his defense on his preliminary examination.

ERROR to *Houghton Circuit*.

*F. M. Brady and Chipman, Dewey & Hawes*, for plaintiff in error.

*Isaac Marston*, Attorney General, for the people.

CHRISTIANCY, J. The plaintiff in error was tried in the circuit court for the county of Houghton, upon an information charging him with having, on the 16th day of December, 1873, at, etc., wilfully and feloniously, and of malice aforethought, assaulted, beaten, and wounded one William W. Perry, with the intent, him, the said Perry, then and there to kill and murder.

The defendant below (plaintiff in error) was convicted, and sentenced to the state prison at Jackson for ten years.

"There was evidence" (as appears by the bill of exceptions) "tending to show that respondent, on the morning of January 2, 1874, confessed having assaulted complaining witness in the manner charged in the information." And for the purpose, as it would seem from the record, of avoiding the force of this confession as evidence, the defendant seems to have undertaken to prove that he was insane when he made the confession—not when he committed the offense—and several exceptions were taken to the judge's charge as to the burden of proof upon that question, the nature of the evidence given upon it, and to a clause in the charge implying that defendant must conclusively prove the insanity.

But we think all questions connected with, or growing out of that of insanity, are outside of the case as presented upon this record.

The bill states that "there was evidence given on the trial tending to show that respondent was insane on the night of the third or the morning of the fourth of January, 1874; and there was evidence tending to show that he was never insane." Now the confession which the evidence tended to show was made on the morning of the second of January, and the record does not show that there was any evidence tending to show that defendant was insane at the time, nor until the night of the third or morning of the fourth; and the clear implication from the record is, that there was no such evidence. It is therefore quite immaterial upon this record what rulings the court may have made connected with the question of insanity. They cannot be assigned as error upon this record.

But the defendant set up in defense, and introduced evidence tending to prove an *alibi*. But upon his preliminary examination before the examining magistrate, he offered no evidence whatever.

As to proof of the *alibi*, it is objected that the court instructed the jury that it must be proved conclusively, or beyond a doubt, to constitute a defense. Though such language was incidentally used in one part of the charge, I am strongly inclined to think such was not the fair meaning of the whole charge upon this subject when taken together. The whole charge upon this point, after properly defining an *alibi*, was this: "When such a defense is made and proven, it is conclusive. It is the best defense that

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can be interposed. It leaves no doubt of the innocence of the party accused, but it must be satisfactory. There must be no doubt about it, or else you cannot give it much credence; so that it becomes very important in connection with space and distance. You must be satisfied that the time and space correspond, and it being proved satisfactorily to you, and being found to be reasonable with time and distance, then it is conclusive. Then, after commenting upon the proof of insanity, which is not here in question, he concludes his charge as follows: "But it is your duty, gentlemen, to take the whole case, under the evidence for the people, and for the defense, and weigh it carefully—every trifling circumstance, every fact, remote or proximate, grave or trivial—all these go to make up the evidence in this case. If you believe, from all the facts and circumstances in this case, that the people have proven their case—for they have the affirmative, gentlemen—and it is their duty to convince you beyond a reasonable doubt—if they have sustained their charge, your verdict will be guilty. But if there should remain in your minds a well founded, reasonable doubt as to the guilt of the respondent, you must give him the benefit of that doubt. Entertaining such a doubt, your verdict will be not guilty, and you must acquit."

This last portion of the charge, if understood by the jury as extending to the question of an *alibi*, as I am inclined to think they must have understood it, would have corrected the error of the previous statement, that "there must be no doubt about it;" and the doubt referred to would be understood as a reasonable doubt."

In a criminal case, however, we must not only see from the record a probability that the defendant has not been injured by any erroneous expression in the charge, but we must be satisfied beyond any reasonable doubt, that he could not have been so injured.

We need not, however, determine this particular question in this case, as there is another error in the record for which the judgment must be reversed; and this particular question will not be likely to arise in the same form upon a new trial. The record states that during the closing argument for the prosecution, Mr. Chandler, one of the counsel for the people, commented adversely to the respondent upon the fact that he, the

respondent, did not interpose the defense of an *alibi* on the examination before the magistrate, it being a matter of record, and the fact appearing that the respondent offered no defense before the examining magistrate. The comment of counsel for the prosecution, being objected to by respondent's counsel, the court overruled the objection; and in the presence of the jury, remarked as follows: "It is the duty of a respondent, when he has a good defense in the nature of an *alibi*, to interpose that defense at the earliest moment possible; and a respondent should offer his defense of an *alibi* before an examining magistrate, with a view to saving himself anxiety and trouble, and the people the great expense of a trial."

Now, while for myself I think it may sometimes depend upon the circumstances of the case, whether the neglect of a prisoner to interpose such a defense before an examining magistrate shall be allowed to be commented upon against him, and considered by the jury (a point upon which my brethren reserve any opinion), yet, I think it quite clear the judge went too far in the present case, when, in the presence of the jury, and therefore having the same effect as if addressed to them, he used the language above cited. It is easy to see that there may have been good reasons why the defendant, however innocent, should, as matter of prudence, have neglected to go into the evidence of the *alibi* before the magistrate. It does not even appear that the witnesses sworn on the trial were present or attainable at the examination.

The judgment must be reversed, and a new trial awarded.

The other justices concurred.

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WALKER vs. STATE.

(52 Ala., 376.)

BURGLARY: *Chinney*.

' On an indictment for burglary, entering through the chimney of a cotton house is a breaking.

JUDGE, J. The indictment in this case was for burglary, and charged the defendant with breaking into and entering the cot-

ton house of Archie Nicholson. The evidence tended to show that the defendant entered the house by going down the chimney, and that after thus entering, he got out of the house through a window, by breaking the fastening of the window from the inside of the house.

It is ingeniously contended by counsel for the defendant, that to constitute the crime of burglary, under section 3695 of the Revised Code, there should be a breaking into and entering one of the houses described in said section; and that as the evidence in this case showed, that the defendant entered and broke out of the house, he was not guilty of the offense charged.

By the common law, descending the chimney of a house is an actual breaking, as much so in legal effect as would be the forcible breaking into a house by any other means. 3 Greenl. Ev., § 76. And such was recognized to be the law by this court in *Donohoe v. The State*, 36 Ala., 281.

In that case the defendant got into and attempted to descend the chimney of a storehouse, but was arrested in his descent, when near the arch of the fireplace, by the smallness of the aperture; and he became so tight and fast that he could not be pulled out, either at the top of the chimney or at the fireplace below, and the chimney had to be pulled down to extricate him. Although the defendant did not enter any room of the house, he was adjudged to have been guilty of the burglary. The court held that a chimney is a necessary opening, and needs protection, as a part of the dwelling house, it being as much closed as the nature of things will admit; and this decision seems to have been well fortified by the numerous authorities cited in the opinion of the court.

There is no error in the record, and the judgment of the circuit court is affirmed.

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STATE vs. POTTS.

(75 N. C., 129.)

BURGLARY: *Dwelling house.*

If a part of a storehouse, communicating with the part used as a store, be slept in habitually by the owner or by one of his family, although he sleeps there to protect the premises, it is his dwelling house.

If a person who sleeps in a part of a store house communicating with the part used as a store is not the owner, or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house.

RODMAN, J. There is no statute in North Carolina changing the common law definition of burglary, which is: The breaking and entering of *the dwelling house* of another in the night time, with intent to commit a felony therein. The question in this case is: Was the house into which the prisoner broke and entered, *the dwelling house* of the prosecutor, Davis? The house belonged to Davis, and was used as a store; a small space was partitioned off from the store-room for a bed-room, and it had been occupied as such regularly for about four years, either by Davis or by some clerk, or other person by his license. It was slept in on the night of the breaking, and had been, on every night for a month before that night, by one Lamb, who was employed by Davis to sleep there for the purpose of protecting the premises. Lamb was not a member of the family of Davis, nor employed by him otherwise than as stated.

The Attorney General relies on the *State v. Outlaw*, 72 N. C., 598. That case can only be distinguished from the present by the fact that Harriss (the person who slept in Cunningham's store) was a clerk of Cunningham and boarded in his family. It was evident that he slept in the store for the protection of the premises. We do not doubt the decision in that case. The differences between that case and the present may seem very slight, yet if they be such as are recognized by the authorities from which we derive the law on this subject, we are bound to recognize them as distinguishing the two cases. Considering the various ways in which houses may be occupied, it is not the fault of the law if the line of separation is thin, or even artificial. The following quotations are all from 2 East P. C., pp. 497, 498. It is clear that if no person sleeps in a house it is not burglary to break in it. *Hallard's Case*. In *Brown's Case*, all the judges agreed that the fact of a servant having slept in a barn the night it was broken open, and for several nights before, being put there for the purpose of watching against thieves, made no sort of difference in the question whether burglary or not. *So a porter lying in a warehouse to watch goods, which is only for a particular purpose, does not make it a dwelling house.*



In *Fuller's Case*, the house, which was a new one, was finished except the painting and glazing, and a workman employed by the owner slept in it for the purpose of protection; but no part of the owner's family had taken possession of it. *Held*, not a dwelling house.

In *Harriss' Case*, it appeared that the prosecutor had lately taken the house, and on the night of the offense, and for six nights before, had procured two hairdressers, none of his own family, to sleep there for the purpose of taking care of his goods and merchandise therein deposited; but he, himself, had never slept there, nor any of his family. *Held*, not a dwelling.

In *Davis' Case*, one Pearce owned the house, but resided at a distant place. It was not inhabited in the daytime, but a servant of the owner slept there constantly for about three weeks, solely for the purpose of protecting the furniture till a tenant could be procured. *Held*, not a dwelling house.

It seems from these cases, that if part of a storehouse, communicating with the part used as a store, be slept in habitually by the owner, or by one of his family, although he sleeps there to protect the premises, it is his dwelling house. If the person who sleeps there is not the owner or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house.

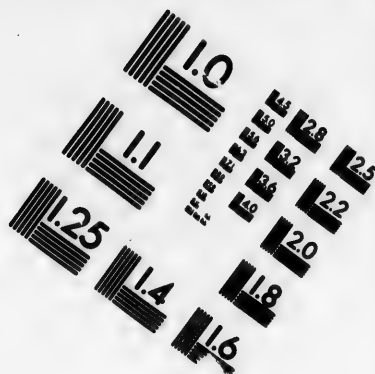
The distinction is not altogether arbitrary or without reason. To break into a house where the proprietor or any of his family sleep is apparently a more heinous offense and calculated to produce greater apprehension and alarm, than to break into a house occupied primarily for business, although a watchman is employed to sleep there. It is competent for the legislature to punish the latter offense in any manner otherwise than capital that it may think proper. I have not seen that by the legislation of any state such an offense is capital, as it would be in this state if held to be burglary. In New York it is burglary by statute, but it is punishable only by imprisonment in the penitentiary.

As our opinion on this question entitles the prisoner to a new trial, it is unnecessary to consider the other questions raised on the record.

There is error in the judgment below, which is reversed. Let this opinion be certified to the end, etc.

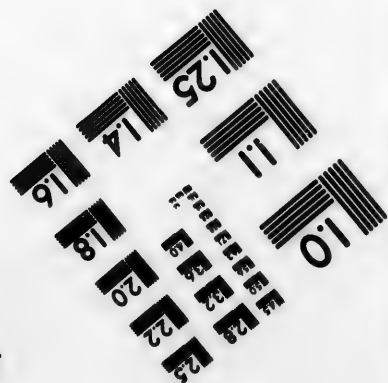
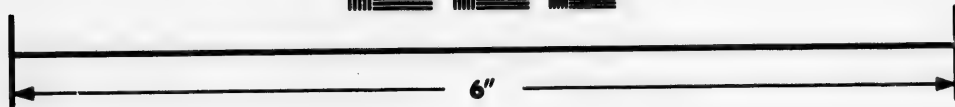
PER CURIAM:

*Judgment reversed.*



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# Photographic Sciences Corporation

**23 WEST MAIN STREET  
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(716) 872-4503**



WOODWARD *vs.* STATE.

(54 Ga., 106.)

BURGLARY: *Intent—Evidence.*

Evidence that the respondent entered the prosecutor's house between twelve and one o'clock at night by raising a window of the room in which the prosecutor and his wife were sleeping, and, when discovered, went out through the window, there being money and clothing in the room, is sufficient to sustain a conviction for burglary, although it does not appear that respondent stole anything.

The intent with which a prisoner breaks and enters the dwelling house of another in the night time is a question of fact for the jury under all the facts and circumstances of the case.

WARNER, C. J. The defendant was indicted for the offense of "burglary in the night time," and on trial thereof, was found guilty by the jury. A motion was made for a new trial, on the ground that the verdict was contrary to law, contrary to the evidence, and without evidence to support it, which motion was overruled by the court, and the defendant excepted. It appears from the evidence in the record that the defendant, between the hours of twelve and one o'clock at night, raised the back window sash of the prosecutor's dwelling house, in which he and his wife were sleeping, propped it up with a stick, and entered the room through the window, and when discovered, went out at the window, was pursued and caught. There was money and clothing in the room. Prosecutor had \$100 in his vest pocket, hanging on the bed post, but it does not appear that the defendant stole anything.

Burglary, as defined by the code, is the breaking and entering into the dwelling, mansion or storehouse, or other place of business of another where valuable goods, wares, produce or any other articles of value are contained or stored, with intent to commit a felony or larceny: Code, sec. 4386. The defendant is charged with having broke and entered the house with intent to commit a larceny, and the point made is, that there is no evidence that such was the intention of the defendant.

The intention of the defendant can only be ascertained from his acts and conduct, and it was a question for the jury to decide, under the facts and circumstances as detailed by the evidence, what was the defendant's intention in breaking and enter-

ing the house at the time of night as proved by the prosecutor. Roscoe's Crim. Ev., 367. We find no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

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WATERS vs. STATE.

(53 Ga., 567.)

BURGLARY: *Evidence.*

In a prosecution for burglary, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt that it was committed in the night time.

In a prosecution for burglary, where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within a period of about forty or forty-five minutes, one-half of which was day and one-half of which was night, the defendant should have the benefit of the doubt necessarily arising, and ought not to be convicted of a breaking in the night time.

TRIPP, J. 1. The proposition is unquestioned, that in all criminal prosecutions, it is incumbent on the state, on the traverse trial, to show affirmatively, either by positive testimony or other satisfactory evidence, that the defendant is guilty of the offense charged against him, or of some less crime which the law permits him to be found guilty of under the indictment. This rule applies to an indictment for burglary in the night. It was but a few years ago that this offense was punishable with death, or, by special recommendation of the jury, by imprisonment for life, whilst the penalty for burglary in the day was imprisonment from three to five years. Rev. Code, secs. 4321, 4322. Now the penalty for the former is imprisonment from five to twenty years; for the latter it is unchanged. Would it be going too far to say that when one is prosecuted for burglary in the night, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt upon that point, before a verdict of guilty could be authorized? If there had been no change in the penalty, and that was yet a capital one, the rule would scarcely be doubted. As it is, the maximum for one grade is twenty years in the penitentiary; for the other, five years.

2. Where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within the period of about forty or forty-five minutes, one-half of which was day and one-half was night, the defendant should have the benefit of the doubt necessarily arising, and the conviction should not be for the highest grade. If a jury reasonably doubt whether a defendant be guilty of murder or manslaughter, that doubt is resolved in favor of life. So, if the doubt be as to different grades of manslaughter, the defendant should have the benefit of it, and the lowest grade covered by that doubt is to be found. It would be difficult to limit the application of this principle, and we think it should control this case. The chief evidence against this defendant was the fact that he was in possession of the watch, which was taken from the house several days after the burglary was committed. I will not remark upon the character of such testimony, whether it is always sufficient to convict, for the authorities are somewhat in conflict; but we say, that, under the proof in this case, we think the defendant should have the full benefit of the first rule we announce in this decision.

*Judgment reversed.*

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STATE *vs.* McDONALD.

(73 N. C., 346.)

BURGLARY: *Confession — Evidence — Indictment.*

Evidence that on the morning of August 12th, the prosecutor discovered between daylight and sunrise that his house had been broken into, that the house was on a public street in a town, and that a dry goods box and chair had been placed beneath the window where the entry was effected, is sufficient evidence to be submitted to the jury that the breaking was in the night time.

There is no rule of law which prohibits a grand juror giving evidence against a prisoner who is being tried on an indictment found by the grand jury of which the grand juror was a member.

Voluntary confessions are admissible against the prisoner.

When an offense is made of a higher nature by statute than it is at common law, the indictment must conclude against the statute; but when the punishment is the same or less, it need not so conclude.

INDICTMENT for burglary, tried before BUXTON, J., at January term, 1875, *Cumberland Superior Court.*

The following is the evidence in the case:

Thomas J. Green, the prosecutor, was introduced as a witness for the state, and testified: I am captain of a steamboat plying between Fayetteville and Wilmington. On the night of the 11th of August, 1874, my dwelling house on Person street, in Fayetteville, was forcibly entered by prying open the blinds of a window on the east side of my house. These blinds I had hooked myself the evening before, and left the sash up for air. On the next morning I noticed my axe lying on the ground under the window. A goods box was also under the window and a chair beside it so as to form steps. I noticed a slight impression or dent in the blinds, and signs of dirt as if from the axe. This was the sleeping room of my little daughter, aged twelve years, and of the nurse. The next morning I found these were the only window blinds open; they were pushed to, but the wrong one first, so as not to shut up tight. The rest of the windows were all closed and the doors were all locked. I had closed and fastened these windows myself before lying down. My own family, consisting of myself and wife, and five children, were all at home. We also had a guest with us that night named Mrs. Carver. I was the first one to rise the next morning. I rose when it was clearly light, between daylight and sunrise. I lost my vest, which I had hung up the night before in the passage at my bedroom door, and with it my watch, which I had left in my vest fob. I also missed my overcoat and \$50 in currency. This money was in a memorandum book, which I had handed to my wife the day before. I found the book on the parlor mantel, but no money. The watch was a fine gold lever watch, with thick hunting case. It was of the make of S. J. Tobias & Co., Liverpool, No. 32,398; on one side a landscape was engraved and on the other a sportsman in the act of shooting a deer. The hands were large steel hands, unusually large, which I had put on specially to see at night. The watch cost \$180, and was 18 carats fine. My kitchen was connected with my dwelling, forming an L, and is sixteen feet from my dwelling. It was entered the same night. The nails over the window sash were broken and the sash was taken out. I think I would recognize my vest. (A vest was then shown to the witness.) This is my vest which my watch was in. I found this vest in a trunk at the prisoner's house on the 11th or 12th of December last. The



trunk was locked, the key could not be got, and the officer broke open the trunk, the prisoner not being present. We found in the trunk this vest; there were also in it an old coat and pants. We saw another trunk there, the key to which we found; it contained the regular clothing of the prisoner. I certainly recognize this vest as the one which contained the watch. I had the prisoner, Robert McDonald, arrested by an officer acting under a state's warrant, at a house four miles from Fayetteville. I had a conversation with the prisoner on our way to town.

The state's counsel proposed to give this conversation in evidence. The counsel for the prisoner objected, and thereupon in reply to questions asked him, the witness answered as follows: The prisoner seemed anxious to communicate. I made no threats, but spoke mildly to him and used no harsh words. The prisoner's counsel then remarked: "It appears no threats were used, and that the statement was voluntarily made; the objection is withdrawn."

The witness then further testified: The prisoner then stated that he bought this vest, a bucket of butter and a piece of cheese weighing five or six pounds, on Friday night, the 4th of December last, between ten and eleven o'clock at night, of a colored man named William Richardson. I asked if this was all he bought. He answered, "yes." I asked, "Robert, did you ever have my watch?" he answered, "Not as I know of. I sold a watch for William Richardson in September last." He then described my watch nearly as accurately as a jeweler would have done it, except the number. I think the prisoner knew my watch; he had seen it time and time again. He had been with me on my boat from 1870, off and on. His name is on my pay roll from that time, at intervals. I asked, "Robert, what did you get for the watch?"

Here the prisoner's counsel renewed the objection to the admission of the conversation, on the ground that the prisoner was under arrest on a criminal charge, was then actually in the custody of the officer, and was not notified that his answer would be used against him, as was admitted by the witness. Upon this ground the counsel for the prisoner moved the court to exclude the whole conversation, both that which was already in evidence and that which follows.

His honor ruled that the state was entitled to introduce the

whole of the conversation on that occasion in evidence, especially after a part of the same had been given in evidence upon a withdrawal of objection by the prisoner's counsel. To this ruling of his honor, the prisoner excepted.

The witness then further testified.

He answered, "Twenty dollars." I asked, "To whom did you sell it?" He answered, "To the captain of a vessel." I asked if he knew his name; he replied that he did not; I asked if he could tell me where the vessel was lying; he answered, "At or near the old New York steamship wharf, in Wilmington." This is a wharf near against the wharf of Worth & Worth. I said, "Robert, it could not have been possible you sold the watch for \$20." He said, "Yes, sir." I said, "Did you know that it was a gold watch?" He said he did not know it, but thought it was; that Richardson told him if he could get \$20 for it to sell it; that it was a galvanized watch; he had won it gambling. I asked, "Robert, are you telling me the truth? That was a fine gold watch, and I prized it highly; it was a present; can't you put me in the way of recovering it?" He said, "Captain, I sold it." The prisoner lived about a mile from me; I saw him here about election time, in August, a few days before; he worked about the river. The pay of a deck hand is \$16.50 per month.

Upon cross-examination, the witness testified as follows:

The prisoner worked for me last spring (1874) a short while; he worked for me some every year since 1870; he had not worked for me regularly for the last two years; he worked for me in 1871. William Richardson, the colored man to whom the prisoner referred, has worked for me regularly for the last two years; he has not lost ten days. When my boat would come up the river, I usually sent some of the hands, when there was nothing else to do, to my house to saw wood. Richardson was up at Fayetteville the night my house was robbed; he frequently chopped wood at my house; he claimed to stay at Allen Harris', near the flour warehouse, one hundred yards from my house. I had Richardson arrested and put in jail for this charge. The prisoner was arrested first, and on the same evening I had Richardson arrested. All I had against Richardson was the prisoner's statement. Both were put in jail. I had before this caused the arrest of two other men, Abram Williams and Adam Jessup, who were both discharged. William Richardson was used as a

witness. I had twelve boat hands under me. I carried the watch before the war. Richardson had as good a chance to see the watch as the prisoner; I have stood with the watch in my hand, timing boat hands in rolling barrels. I would not swear the prisoner ever saw the hands of the watch or the engraving of the hunter on the case. I have never seen my watch since it was stolen; I did not see the vest from the time it was taken, on the 11th of August, at night, until I saw it in the prisoner's house two weeks after the 4th of December, on Friday. I did not tell the prisoner what he was arrested for; I did not tell him I had got my vest; he told me without hesitation about his getting the things from Richardson. Richardson was in town the night my house and kitchen were robbed, and the next day.

Upon redirect examination the witness testified:

The prisoner said the butter was in a tin package, sealed up like a paint can. I asked, "What did you do with that package?" He said, "We used a part, and I carried the balance to my sister the day before." This conversation occurred the day of the arrest, on a Friday, two weeks after the 4th of December, 1874, being the 18th of the month. I did not lose cheese and butter on the occasion of my house being entered on the night of the 11th of August, but on a subsequent occasion when my house was entered again by some one. The prisoner described the watch as having a white face, large steel hands, and ordinary chain worn smooth.

Capt. Oldham was introduced as a witness on behalf of the state, and testified as follows: I know the prisoner. I saw him in Wilmington on the 12th of September last on board of a vessel run by Capt. Lyons, lying at Leppill's wharf. I then saw in the hands of the prisoner on board the vessel a double cased watch with a landscape engraved on one side, and on the other a hunter, a deer, and a dog. It had a white face and large steel hands; its number was 32,398. I made a memorandum at the time. I asked the prisoner his object in selling. He said he was then away from home, without money, and sick, and wanted money to get home with, and that he lived in Charleston, that he would take \$75 for it, but would prefer to pawn it for \$20 as he had owned it a long time, and hated to part with it. I asked what guaranty he would give that the watch would be called for. He answered that he had owned the watch a long time and

swinging it around his head he said he would not be afraid to show it in any city. I asked him to give me the names of some people living in Charleston. He mentioned some names. I did not know them. I knew such names in Wilmington. I am not acquainted in Charleston. When I went up to him he had the watch and chain both in his pocket and out of sight. I went to question him in consequence of information I had received. I afterwards, during the same day, searched the wharf for the prisoner, and could not find him. Search was also made by detectives, but we did not find him.

Upon cross-examination the witness testified: I never saw the prisoner before the 12th of September last. I took down the number of the watch. A man came to me and asked me to go and look at the watch. It was Capt. Lyons of the schooner. I told the prisoner that \$75 was more than I would give for the watch. Capt. Lyons was on board the vessel when I got there. So was the prisoner. I told Capt. Lyons I had come to see the watch, and he pointed out the prisoner to me. I went up to the prisoner, and asked to see the watch he wanted to sell. I do not know whether Capt. Lyons bought the watch. I left the prisoner on board. I was there some fifteen minutes. I did not search any house in Wilmington for the prisoner. I did not take down the name of the maker of the watch.

William Richardson, a witness for the state, testified as follows: I have been working for Capt. Green for three years. I never sold a vest, or butter, or cheese to Robert McDonald. I never gave him a watch to sell.

Upon cross-examination the witness testified: I live below the flour warehouse. I work for Capt. Green on the boat, and sometimes cut wood for him at his house. I came up the river the morning of that night on the boat with Capt. Green. That night I was out between 11 and 12 o'clock. There was a little festival going on in town that night. I went there and got home at 11 or 12 o'clock. This was the night of the last robbing. On the night of the first robbing there was a procession in Fayetteville, and it was raining. I was in the street awhile burning barrels. I was at Capt. Green's next morning about 7 o'clock. I lived one hundred yards off. I had heard up the street about the robbing and I went to see and look about. I saw they had robbed the house. I was arrested by the deputy sheriff the same

day the prisoner was, while I was at work on the boat. I proved where I was. Ned Gilmore was one of my witnesses. Julius Evans and Sam Jones proved where I was. They were examined by 'Squire Whitehead. The prisoner did not get any of the things from me. I know Capt. Greens' watch because it was a watch he had a long time, and I saw it so often. He pulled it out so often when I worked under him. It had a white face and the largest steel hands I ever saw on a watch. It was a double case gold watch. I never had hold of it. It had a heavy gold or plated chain. I have vests (the witness had on no vest at the time); I never sold any to the prisoner. I came from Bladen county and formerly belonged to Dr. Richardson. I used to run on the railroad train, but my partner got his arm cut off and I quit. His name was Wash. Chapman. We were train hands.

Upon redirect examination the witness testified: I asked the prisoner while we were in jail, why he had me put in jail for nothing? He said somebody like me brought the thing to him. The prisoner was not working on the boat when this happened.

Joseph A. Worth, a witness for the state, testified: "On one occasion after the prisoner was committed to jail by the justice of the peace, I went to see him, in company with the deputy sheriff and Captain Green, to get information about Captain Green's watch. The prisoner was told he was not bound to answer, and that anything he said might be used against him. I asked him where he got the ten dollars in money he had sent his wife."

The prisoner objected to the evidence of the witness, on the ground that he was a witness and also foreman of the grand jury that passed the bill which was now being tried. The counsel for the prisoner took the ground that he was on that account an incompetent witness; as presiding officer of the grand jury he was, in effect, a judge, and could not also be a witness in a case before him. The witness stated that he was foreman of the grand jury, and had been sworn as a witness and examined before the grand jury, but did not vote upon the bill. The rest of the grand jury were all present, and voted aye on the bill. There was no dissenting voice. It was usual when there was any dissenting voice to require a division. There was no dissenting voice and no division in this case. His honor overruled the objection, and the prisoner excepted.

The witness then testified: "The prisoner, in reply to my

question, said that he had carried four dollars away from here with him, and had earned the other six on the wharf, in Wilmington. I asked him if he really did sell the watch to the captain of the vessel? He answered 'yes.'"

Upon cross-examination, the witness testified: "I was present at the trial before 'Squire Whitehead, the examining justice. Both Richardson and the prisoner were charged. Gilmore was examined, but not as to an *alibi* for Richardson. Julius Williams was there. Richardson was examined."

Upon redirect examination, the witness testified: "I have known the prisoner for several years; his means are limited; he is a laboring man, and lives by work."

Thomas J. Green was recalled by the state, and testified: "I think I know the general character of the witness William Richardson. His associates think well of him; I have never heard him accused of stealing."

Upon cross-examination, the witness stated that he had Richardson arrested about this matter.

The counsel for the prisoner asked the court to charge the jury:

1. That there is no evidence that the house of the prosecutor, Captain Thomas J. Green, was broken and entered in the night time; that in a charge of this nature, time was a material circumstance to be established, and by direct and positive testimony, and not by mere inference.

2. That the possession by the prisoner was not a recent possession, so as to raise a presumption in law that the prisoner stole them.

His honor declined to give the first instruction prayed for, and charged the jury in relation thereto as follows:

"That it was absolutely necessary for the state to prove, to the entire satisfaction of the jury, that the breaking and entering was done in the night time, that is, at a time when there was not daylight enough to discern a man's face in the yard. That it was competent to prove this, as well as other indictments of burglary, by circumstantial evidence. The effect of the evidence, however, must be so convincing on the minds of the jury as the sworn evidence of a credible eye witness. The jury are not to jump at conclusions. In this case there is some evidence to be considered by the jury, that the breaking and entering was done

in the night time. The circumstances detailed in the evidence, tending to show this, have been referred to by the counsel on the part of the state, viz.: the early hour when the discovery was made by Captain Green that his house had been entered and robbed, stating that he rose when it was clearly light, between daylight and sunrise, the preparation made for effecting the entrance, the getting together under the window, the axe, box and chair, involving the expenditure of time in making these arrangements, the time taken in effecting the entrance and completing the robbery in the house, the situation of the house on a public street in Fayetteville, involving exposure if the entrance had not been effected in the dark."

These circumstances were pressed upon their attention by the counsel, to satisfy them that the breaking and entering was done in the night time. The state must satisfy the minds of the jury upon this point beyond a reasonable doubt, otherwise a conviction of burglary is out of the question.

To this charge of his honor the prisoner excepted.

His honor gave the second instruction prayed for, but added: "While the possession by the prisoner of the watch and vest, owing to the lapse of time since the loss, was not a recent possession, so as to raise a legal presumption of guilt, yet the fact of possession is a circumstance to be considered along with the other circumstances of the case, in determining the question whether the prisoner was guilty of the larceny. Whether these circumstances were proved, and what weight they were entitled to, it was a question for the jury to say. Among these was the circumstance that the articles, the vest and the watch, stolen from the house at the same time, are found in the possession of the prisoner; that one of the articles, the watch, was of a nature and value unsuited to the means and condition in life of the prisoner; that he was contradicted by William Richardson in his account as to how he came by these articles; the conflicting character of his own statements in reference to the watch, made to Green and Oldham."

To the foregoing portion of his honor's charge, the prisoner excepted, especially to his honor's including in the enumeration of circumstances "that one of these articles, the watch, was of a nature and value unsuited to the means and condition in life of the prisoner."



The jury returned a verdict of "guilty of burglary," and thereupon the prisoner moved for a new trial. The motion was overruled, and the prisoner moved in arrest of judgment upon these grounds:

1. Because the indictment was concluded at common law, whereas it should have concluded, "against the form of the statute."

2. Because the indictment charged that the breaking and entering was for the purpose of committing a larceny, whereas the offense of burglary consists in breaking and entering for the purpose of committing felony.

The motion in arrest was overruled, and judgment of death pronounced by the court, from which judgment the prisoner appealed.

*W. L. McL. McKay* and *Guthrie*, for the prisoner. *Hargrove*, Attorney General, for the state.

BYNUM, J. None of the objections raised by the counsel for the prisoner are available to him.

1. The confessions of the prisoner were voluntary and admissible, even without the consent of the counsel; but when the counsel withdrew his objections, and allowed the greater part of the conversation between the witness and the prisoner to be given in evidence, he had no right, by removing the objection, to exclude a part or the whole. *State v. Davis*, 63 N. C., 578.

2. We know of no rule of evidence which excluded the testimony of Worth because he was a grand juror, even if he had acted as such in finding the bill. But when it appears that he declined to act or vote on the bill, because he was a witness, there is no ground for objection to his competency.

3. The counsel for the prisoner asked the court to instruct the jury that there was no evidence that the breaking was in the night time. This was properly refused, because there was much evidence given, going to show that the breaking and entering were in the night time. The evidence is set forth in the case, and we think it fully sustains the ruling of the court; and when the court proceeded to charge the jury that they must be satisfied, beyond a reasonable doubt, that the breaking and entry were in the night time, it was then for them to say from the evidence how the matter was.

4. The court was asked to instruct the jury that the possession of the watch proved, was not such a recent possession as raised the presumption of law, that the prisoner was the thief. This instruction was given, but the jury were told that this possession of the stolen article was a fact which they might consider with the other fact upon the question of his guilt. In this there was no error.

5. The counsel moved in arrest of judgment, because the indictment concluded at common law, when it should have concluded against the statute.

This objection is disposed of by this court in the case of the *State v. Ratts*, 63 N. C., 503. When the offense is made of a higher nature by statute than it was at common law, the indictment must conclude against the statute; but if the punishment is lessened, it need not so conclude. In our case, the offense of burglary is the same that it was at common law, and the punishment is neither greater or less than it was at common law, but the same. The conclusion of the indictment was therefore proper. The other objections made in the record have no force in them, and were not insisted upon in this court.

There is no error.

PER CURIAM:

*Judgment affirmed.*

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STATE vs. FENN.

(41 Conn., 590.)

LARCENY: *What constitutes — Felonious intent — Description in information — Variance — Evidence.*

An officer of a bank with which a note of the defendant had been left for collection called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him, walked out of the room with it, and secreted or destroyed it. In a prosecution against him for theft, it was *held*, on a motion of the defendant for a new trial, that the court below properly charged the jury that if the defendant obtained possession of the note with a felonious intent, the act was theft.

Also that the court properly charged that the intent to deprive the owner of his property, and to gain some advantage to himself, constituted a felonious intent.

The "taking" in theft need not necessarily be secret, and without the knowledge of the owner, but may be done openly, by deception, artifice, fraud or force.

The note was described in the information as "a certain promissory note dated November 6, 1872, signed by the defendant, for the payment to W. or order, of \$2,300 on the 1st of May, 1872, value received, a more full description of which is to the attorney for the state unknown." *Held* to be sufficiently described.

The note was in fact for \$2,300 and interest and all taxes. *Held* not to be a fatal variance, all that is required being such substantial accuracy as shall make the identity of the note unquestionable, and protect the accused from another prosecution for the same offense.

And *held* that the defendant, who wrongfully took the note and destroyed it, should not be permitted to say that it was not described with the utmost particularity.

The note was payable to W. or order, and was by W. endorsed to H., and by H. endorsed in blank, and it had been left by H. at a bank for collection. The information described the note as the property of H. *Held* that the fact of its being indorsed by H. did not necessarily show that H. was not still the owner, and that the judge below, after instructing the jury that the note must have been delivered by W. to H. properly left it to them to say from all the evidence, whether W. had delivered the note to H., and whether H. was still the owner.

And *held* that the judge properly charged the jury that the state was bound to prove the note to be of some value, but that they were not limited to direct evidence on this point, but might consider any evidence from which the value might be inferred.

INFORMATION for theft; brought to the Superior Court in *New Haven* County, and tried to the jury, on the plea of not guilty, before LOOMIS, J.

The information charged that at the town of New Haven, on the 3d day of May, 1873, William S. Fenn of said town, with force and arms, one certain promissory note, dated November 6, 1872, signed by the said Fenn, for the payment of twenty-three hundred dollars, for value received to F. J. Whittemore or order, on the 1st day of May, 1873, and by the said F. J. Whittemore endorsed, and by him delivered to Henry A. Warner, of said New Haven, a more particular description of which is to the attorney for the state unknown, of the goods and chattels of said Henry A. Warner, and of the value of twenty-three hundred dollars, feloniously did steal, take, and carry away, contrary to statute in said case made and provided, and against the peace.

Upon the trial the state offered in support of the prosecution the evidence, among others, of *William T. Bartlett*, who testified as follows: On the 30th of April, 1873, I was and ever since have been the treasurer of the Union Trust Company of New Haven, a company engaged in banking business, and on that day

Henry A. Warner left with me as such treasurer, a note for collection, the proceeds to be placed to the credit of Warner if collected, but if not paid on demand, the note to be protested in the usual manner.

The note was taken possession of by the defendant, and he did not return it to me. He stated that he had placed it in the hands of a friend, and subsequently he stated that he had used it in a water closet. The last I saw of the note the defendant took it. I think a correct description of the note is as follows:

"\$2,300. New Haven, November 6th, 1872. On the first day of May, 1873, I promise to pay to F. J. Whittemore or order twenty-three hundred dollars, with interest semi-annually, and all taxes assessed on said sum, value received. *W. S. Fenn.*" [To the introduction of this evidence the defendant objected, on the ground of variance as to payment of semi-annual interest and taxes. The state claimed that there was no variance, as at most it was a redundancy of proof and not of allegation, and also that as the defendant had destroyed the note, it was not competent for him to object that it was not described with exactness. The court overruled the objection, and admitted the evidence.] The note was endorsed, "Pay H. A. Warner or order. F. J. WHITTEMORE." Also endorsed "H. A. WARNER." [This was excepted to by the defendant, as the information did not state how the note was endorsed, but the court overruled the exception and admitted the evidence.] I had sent notice to Fenn of the time the note fell due, and on the 3d day of May, 1873, the note not being paid, I took it, being a notary, to demand payment and protest it. Having the note, I called on Fenn at his office in the Globe building, New Haven. I said to Fenn, "I came to make an official demand for the payment of this note," at the same time holding the note in my hand. Fenn said, "you wish it paid, do you?" I said, "I do." Fenn then said, "Do you wish it paid to-day?" I said, "Certainly, it is due to-day." Fenn then said, "Let me see the note." I placed the note in his hand as he was sitting down. He took it and turned it over and examined the endorsements, as was customary, and then asked me, "What is the amount of interest due?" I replied that I had not computed it, understanding that he was not ready to pay it. Fenn then said, "Well, figure the interest." I then looked about for a bit of paper and commenced to figure the interest, the

note still being in his hand; he had moved off some little distance from me at that time. While I was busy computing the interest, Fenn said, "I would like to speak to a friend a moment," and stepped out the door. I waited as I supposed a sufficient time for his return, and he not appearing, I stepped to the door leading from the room at the top of the stairway leading to the street. I stopped there for a short time, when Fenn appeared coming from an inner apartment. I could not tell where. He was about to pass me and go down the stairs to the street, and said: "Step into my office a moment and I will step out and get the money," and also said something about going to the bank in that connection. I said that he had better leave the note with me while he went out. He then said he had handed the note to a friend, or placed it in the hands of a friend. I said to Fenn that he could not leave the building till he produced the note. He turned and went into his office without any opposition. I then went to the foot of the stairs and saw a policeman, and requested him to sit in the room occupied by Fenn till my return. I went out and consulted the authorities, and returned to Fenn's office, and said to him that I did not wish to make him any trouble; if he would produce the note that was all I required. Fenn said he could not produce it, as it was in the hands of a friend. I said to him, "Can you produce the note if you go to see your friend?" He said he could see. I said to him, "You certainly know whether you can produce the note or not, if you go to your friend." He said he could see. Not getting any satisfaction, I went out and put the matter in the hands of John W. Alling, city attorney. Mr. Alling drew up the necessary papers and went to Fenn with me. He said to Fenn that he had got himself into trouble, and he had better produce the note. Fenn said he could not do so. Alling then asked Fenn what he had done with the note. He replied that he went to the water closet and used it. Alling said it was an important matter, and he had better go to the water closet and see if it could not be found, and I believe they went. Fenn left the room in company with the officer. They soon returned and reported that they had examined the water closet without having found the note. I then left the matter in the hands of the city attorney, and returned to my place of business.

*Cross-examined.* The original note was not before me when

I made the copy I have here. I made it first from recollection, but afterwards took the copy from the record of the mortgage given to secure this note as recorded in the office of the town clerk. The note was secured by mortgage of real estate. My recollection of the endorsements on the back of the note is as follows: "Pay H. A. Warner or order. F. J. WHITTEMORE." Further endorsed: "HENRY A. WARNER." I went to Fenn's office about three o'clock. He was sitting at his table, but not engaged at the time, I think. It was probably only two or three minutes after I first spoke to him that I handed him the note. When he asked me to figure the interest, I think I sat down in the same chair he vacated when he took the note. I found the scrap of paper myself to figure the interest. He soon left the room. After I commenced figuring, I don't know what he was doing; he went out in two or three minutes; he had the note in his hands from the time I handed it to him until he left the room; he had his hat on when I went in, and all the time while I was there. I do not know the location of the water closet where he went.

*John W. Alling* testified as follows: "I went to Fenn's office with a warrant which I drew up upon Mr. Bartlett's complaint; I was well acquainted with Fenn. I said to him: 'I am sorry you took that note. What made you do it?' Fenn said that there had been a fraud played on him by Whittemore, and he took it. I replied: 'Suppose there was, that don't affect Mr. Bartlett or Mr. Warner, who took it before it was due.' Fenn said: 'I do not know about that.' I then said: 'It is a pretty serious thing, it seems to me; in my judgment it is a state's prison offense to take a note in that way.' Fenn then said: 'I will take care of that.' Then I said to Fenn: 'Anyhow, it is nonsense, because your taking the note has not done you any good, for your liability is the same as if you had not got it.' Fenn said: 'Is that so? I supposed if the note was gone, the whole thing was gone, or they could not do anything more about it.' I think I also said: 'You can't pay it in that way.' I then told Fenn he had better give up the note. He then said: 'I have n't it, and cannot give it up, anyway; to tell the truth about it, the note is destroyed.' I asked him what he had done with it, and told him that he had told Bartlett that he had given it to a friend. He said that when he left the office, he went to a

water closet, and put it in the bowl. I suggested that he had better look for it, as it was possible that it was not lost. He said probably there was no use in it, but he would try. He and the officer went and came back and said it was not there. I did not say that I was a prosecuting officer; nothing said about it."

*Cross-examined:* "I think I first said: 'I am sorry, Mr. Fenn, you took that note, and why did you do it?' He did not say he had taken it, but said Whittemore had wronged him in the transaction out of which the note grew. I knew nothing about any suits then pending. I told him it could not affect Warner or Whittemore, and he said he did not know about that."

*George S. Selleck* testified as follows: I am a policeman at New Haven. While standing on the street corner near the building in which the accused had his office, Mr. Bartlett spoke to me, and said he would like to have me come up stairs. I did so, and Mr. Bartlett said Mr. Fenn had taken a note from him, and he wished me to remain there in the office till he returned. He went away and after awhile returned. Bartlett then asked Fenn what he had done with the note, and why he did not return it. Fenn said he had put it in the hands of a friend and he could not return it. Bartlett went out and soon after came in with Mr. Alling and an officer, and then Mr. Alling had a conversation with Fenn; he told Fenn he thought he had got himself into trouble by taking the note, and after some conversation that I do not remember, Fenn said he had taken it to the water closet and had destroyed it. At the suggestion of Mr. Alling, Fenn and I went to the water closet and examined it, but could not find the note. We then returned to Fenn's office and Alling handed me a warrant to arrest Fenn, and I arrested him.

*William S. Fenn*, the accused, testified in his own behalf as follows: The note was given by me to F. J. Whittemore for \$2,300, as part of the consideration on a trade with Whittemore in exchanging land. I agree with the statement of Bartlett and Alling as to what took place at my office. When Bartlett handed me the note I had no intention of destroying it. The water closet is situated at the west end of the hall, on the same floor with my office. I had the note in my hand, and as I rose from the seat, when I threw the paper into the bowl, the note went with it. This note was secured by mortgage.



*Cross-examined.* I had no intention about the matter when I first took the note from Bartlett. After I had looked at the note and the indorsements, and had asked Bartlett to compute the interest, I had no intention respecting it, and all that I did with the note was an accident, and I meant to have the jury so understand.

The witness further in chief, and on cross-examination, testified to facts tending to show that Whittemore had defrauded him in the exchange of land, for which the note was given, and introduced other evidence to the same point, and claimed to have proved the fraud. The state, on the other hand, to rebut the claim of fraud, offered evidence to prove, and claimed to have proved, that the exchange of land was a fair transaction, and perfectly understood by Fenn, and that there was no fraud whatever.

The foregoing is all the evidence offered on the trial, except evidence on the one hand to show the fraud, and on the other to rebut the claim of fraud, which evidence is not material to any questions now made in the case.

The defendant upon the foregoing evidence requested the court to charge the jury as follows:

1. That the defendant was entitled to an acquittal because a full and particular description of the note was known to the state attorney at the time of instituting the prosecution, and was not given in the information. But the court did not so charge the jury.

2. That the defendant was entitled to an acquittal because the description of the note offered in evidence and the indorsement were each materially variant from the note and indorsement described in the information. But the court did not so charge.

3. That the defendant was entitled to an acquittal because there was no legal evidence introduced to prove that Warner was the owner of the note; but, on the contrary, his blank indorsement on the note showed that the title was not in him; and because there was no evidence that Whittemore ever delivered or indorsed the note to Warner or sold it to him.

The court did not so charge the jury, but charged on this point as follows: "The state is bound to prove, and the jury must be satisfied, from the evidence, beyond a reasonable doubt, that the note in question, when taken by the defendant, was the

property of Henry A. Warner, as alleged in the information. The note, it is conceded, was originally given by the defendant to Whittemore, and payable to his order; it must therefore be proved that the title to the note passed from Whittemore to Warner, and that when taken, it was the property of Warner. It is alleged in the information that Whittemore indorsed and delivered it to Warner, and evidence to satisfy you of this fact is essential. A note payable to order does not pass by delivery alone, but must also be indorsed. The state claims to have proved that Warner was the owner of the note, from the testimony of the defendant, that he gave the note to Whittemore; that on the back of the note were the words, 'Pay Henry A. Warner. F. J. WHITTEMORE.' And from the testimony of Bartlett, that he received the note from the hands of Warner, with instructions to collect it and place the proceeds to Warner's credit, and if not collected, to protest it; and it will be for the jury to determine, from all the evidence in the case, whether Warner owned the note at the time it was taken by the defendant. If you are not satisfied, from the evidence, that Warner was such owner, it will be your duty to return a verdict of not guilty. The fact that the note was indorsed in blank by Warner will not prevent it from being his property, provided such indorsement was made merely for purposes of collection."

4. The defendant further claimed that the court should charge the jury that he was entitled to an acquittal, because there was no evidence introduced to prove that the note at the time the same was taken by the defendant was of any value whatever.

The court did not so charge the jury, but instructed them as follows: "The state is bound to prove that the note was of some value, and if not proved the jury must acquit the defendant. The jury are not restricted to direct evidence showing the value, but may consider any evidence, though indirect, from which the value may naturally be inferred."

5. That the court should instruct the jury that the act of taking, to constitute theft, must be private, or designed by the taker to be private, and without the knowledge of the owner or the public, and further, that by the term "felonious intent," as applied to theft, was meant an intent to deprive the owner of his property privately without his knowledge or the knowledge of the public, and to convert the same to the use of the taker in

such a manner as to prevent the owner from knowing where his property was, or who had taken it.

The court did not so charge the jury, but instructed them as follows: It is essential that the evidence convince the jury beyond a reasonable doubt that the defendant took this note, as alleged, with a felonious intent. Without a specific and actual intent to steal, there can be no theft, and the taking, though wrongful, would be only a trespass, and the act of taking the note, and this felonious intent to steal must both concur in fact and in point of time. This felonious intent must be to deprive the owner of his property on the one hand, and on the other the taker must intend some gain or advantage to himself, in distinction from a mere act of mischief to another. But it is not legally essential to constitute the crime of theft that the taking be secret or in the night, though the jury will bear in mind that such circumstances are most pregnant evidence to manifest the intent. If the taking was secret or designed to be so, or was under the cover of darkness, it would be the strongest kind of evidence to show a felonious intent; and if, on the other hand, the taking was open, or in the presence of the owner or of other persons, it would be equally strong evidence that the taking was without a felonious intent, and therefore a mere trespass; but these things are matters of evidence for the jury, who alone are to find the intent upon consideration of all the circumstances; and if instead of a clandestine or private taking, or a taking under cover of darkness, designed by the taker to conceal his outward act, there be a taking by statagem, artifice or fraud, designed by the taker to conceal his mental purpose, which is precisely the same in both cases, then the act is the same and the crime the same in both cases."

6. The defendant further claimed that the court should instruct the jury that the act of taking, accompanied by all the circumstances stated by the witnesses on the part of the state as matter of law, did not constitute theft. But the court did not so instruct the jury.

7. Also that the claim of the state, that the possession of the note was obtained by fraud, was not supported by the evidence; that the defendant asked Bartlett to let him see the note, and that therefore Bartlett handed Fenn the note, and that all the subsequent acts and declarations of Fenn after he had obtained

possession of the note had no bearing upon the question of fraud in obtaining it.

But the court did not so charge the jury, but instructed them as follows:

"It will be for the jury to decide what Fenn meant by the request to Bartlett to let him see the note. Did he intend thereby to have Bartlett understand that he wanted the mere temporary possession of the note, merely to see if it was genuine, to examine indorsements and signature, to compute the interest, or to pay it, while at the same time his real purpose was, in that way permanently to deprive Bartlett of the note and to steal it? The request to see the note might have an honest or a dishonest purpose, and to enable the jury to determine the real purpose and meaning of that request, the subsequent acts, false declarations and conduct of the accused, may be received and considered by the jury, although it is obvious that if specific acts of falsehood, artifice or fraud could be shown prior to the delivery of the note by Bartlett to Fenn, the evidence would be more weighty."

8. The defendant further claimed that the court should instruct the jury that they would not be justified in finding the defendant guilty, although at the time he received the note from Bartlett, he intended to convert it to his own use, unless they should also find that he took it without the consent of Bartlett, or that he obtained Bartlett's consent to his taking it by falsehood, or by force, or by fraud.

Upon this point the court instructed the jury as follows:

"In order to find the defendant guilty, the jury must find that at the time he asked Bartlett to let him see the note, he had a felonious intent existing in his mind, and if the jury should find that he obtained possession of the note from Bartlett by stratagem, artifice, or fraud, and that he falsely pretended to him that he wanted to see the note for the mere purpose of computing the interest, or paying it, when in fact he had no such design, but intended to deceive and did deceive him, and his real intent then formed and existing in his mind, was to get hold of the note and deprive Bartlett or the owner permanently of it, with the intent thereby to secure a pecuniary advantage to himself, then the jury might find him guilty of theft."

The jury returned a verdict of guilty, and found the value of

the stolen note to be twenty-three hundred dollars. The defendant thereupon moved for a new trial for errors in the rulings and charge of the court, and upon the ground that the verdict was against the evidence in the case.

*H. B. Munson* and *W. C. Robinson*, in support of the motion:

*First.* The verdict was against the evidence. To sustain the verdict the state must show that the defendant, 1st, did steal, take and carry away, 2d, with felonious intent, 3d, the particular note described in the information, 4th, of the value of \$2,300, 5th, of the goods of Henry A. Warner. Not one of these propositions was sustained by legal evidence.

1. He did not steal. The note was voluntarily "placed in his hands." Theft implies a private, secret taking. Webster's Diet., *Theft*; 2 Swift, Dig., 341; 2 East, P. C. 687; *Regina v. Gardner*, 9 Cox, C. C., 253; *Rex v. Sullens*, 1 Moo. C. C., 129; 1 Bish. Crim. Law, 260.

If we adopt the modern doctrine of constructive theft — "a delivery obtained by fraud", we say that he did not obtain possession of the note by force or fraud. The state must prove the fraud; it is not to be presumed. Fenn must have uttered or acted a falsehood to induce the delivery of the note, or else there could be no fraud. He simply said, "Let me see the note?" Suppose he had said, "Let me take the note?" There is neither fraud nor falsehood in these requests. If he had said, give me the note and I will give you my check or the cash, then the delivery of the note might be said to have been obtained by fraud. There is not a case to be found, from the earliest reports down to the present time, where a conviction has been had, because the possession of an article was obtained by fraud, where the fraud proved was not gross, actual and apparent; and to sustain a conviction on these facts, is to totally obliterate the line of demarcation between malicious trespass and theft.

2. There was no legal evidence of a *felonious intent* on the part of Fenn when he received the note handed him by Bartlett. This is essential and must be proved. 2 Swift Dig., 341. A felonious intent in larceny is only evidenced by force or fraud preceding or accompanying the act of larceny. 3 Greenl. Ev., § 157; 2 Swift Dig., 342. Felonious intent is rebutted by the fact that the taking was open, public, avowed and justified imme-

diately after the taking. There was no attempt to conceal the fact of his having the note, although there was an equivocation on his part as to the disposition of it at first. His purpose not to return it to Bartlett was manifest from the first. And when the officers came, he avowed and justified the destruction of the note on the ground of Whittemore's fraud in obtaining the note from him. The state introduced the evidence of Fenn's conduct and declaration to prove the intent, and offered no evidence to disprove the reasons given by him for the destruction of the note. He asserted a claim of right at the time of the transaction, and the state rested without offering any evidence to disprove that claim. 2 Swift Dig., 341; 3 Greenl. Ev., §§ 157, 158. On this point the finding of the jury is clearly against the evidence.

3. The allegation of *ownership of the note* was material, and ought to have been proved. 2 Swift Dig., 340; Roscoe's Crim. Ev., 512; 3 Greenl. Ev., 161. The only evidence on the subject of the ownership of Henry A. Warner is, that on the 24th of April, 1873, a person of that name left with Bartlett as treasurer, "a note for collection, the proceeds to be placed to the credit of said Warner, if collected, but if not paid, to be protested, etc." and that the note purported to be indorsed, "Pay H. A. Warner or order." This evidence is clearly insufficient; for every material fact must be proved by proper legal evidence beyond a reasonable doubt. On this point it failed, and the verdict is without foundation.

4. The allegation that this negotiable note was *indorsed and delivered* by Whittemore was material, and ought to have been proved, because it was not only a descriptive allegation, but an allegation by which alone the title of the note could be transferred from Whittemore to Warner. "When a person or thing is described with greater particularity than is necessary, those circumstances must be proved." Roscoe's Crim. Ev., 76; *United States v. Porter*, 3 Day, 283. The state seems to have gone upon the theory that the simple name, F. J. Whittemore, appearing on the note, of itself proved that Whittemore put it there. *Rea v. Craven*, Russ. & Ry. C. C., 14. Here, also, the verdict is unsupported.

5. The allegation of *the value of the note* is also material, and ought to have been proved. The finding of the jury that the note was worth or of the value of \$2,300 rests simply on the

sum named in the note, and in the fact that the note was in some measure secured by mortgage, without any evidence that the maker or indorser, or the mortgage security, were worth a dollar. This evidence is insufficient. 3 Greenl. Ev., § 153. There is no presumption that the note of a private citizen is of any particular value, or of its face value. There could be no gain to the taker or loss to the owner in its destruction; it was one of several evidences of debt, any one of which was sufficient. The note had no market value in itself, and its transfer passed no property; by taking it the defendant could not steal the title any more than he could steal the title to land by stealing the deed. If the note was of some value as a piece of paper, that value was nominal, not proved and not within the jurisdiction of the court.

*Second.* The court erred in its rulings and charge: 1. As to the variance. The court erred in admitting the note in evidence against the objection urged by the defendant; and also, in refusing to charge the jury that the variance between the note alleged and the note proved was material and fatal. Such variance did exist in this: the allegation is of a note of a given date, payable at a given date, for the sum of \$2,300, for value received. The note proved coincides in date and time of payment, but the promise is greater. The maker agreed to pay, and the payee was entitled to receive, by the express terms of the note, a much larger sum than \$2,300, viz.: the interest and the taxes. These two items are integral and material parts of the contract, both as to the identity of the note, and as to its value. A conviction for stealing the one described would be no bar to a prosecution for stealing the different one proved. In a civil action, the same misdescription would be fatal, and the rule is the same in this case, but with greater strictness in favor of the accused. *Regina v. Lowry*, Law Rep., 1 Crown Cas., 61; *Regina v. Jones*, 1 Cox C. C., 105; *Regina v. Bond*, 12 id., 257; *Rex v. Owen*, 1 Moody C. C., 118; *Rex v. Decley*, 1 id., 303; *Rex v. Bond*, 1 Den. C. C., 517; *Rex v. Wolford*, 1 Moo. & Rob., 384; *Rex v. Jones*, 5 Car. & P., 156; *Commonwealth v. King*, 9 Cush., 284; *Commonwealth v. Beaman*, 8 Gray, 497; *United States v. Hardyman*, 13 Pet., 176, 179; 1 Bish. Crim. Law, 1052, 1053; 2 Bish. Crim. Proc., 710; Arch. Crim. Pl., 190.

2. The court erred in refusing to charge the jury that when the note could be accurately described by the state's attorney, he



was bound so to describe it. Goods alleged to be stolen must be accurately described (2 Swift, 840), unless the attorney is unable so to describe them, in which case he must so state. In this case the attorney neither describes the note accurately, nor says that he cannot so describe it.

3. In refusing to charge as requested concerning the ownership of the note. The defendant was entitled to this charge. The facts were as described, and on these facts an acquittal should follow.

4. In refusing to charge concerning the value of the note as requested. The defendant was entitled to this charge. The facts were as described, and on these facts an acquittal should follow. The court did not so charge, but told the jury that they might *infer* the value from any evidence there was. The evidence is all in the record, and we submit that there is nothing on which to base a conjecture.

5. In refusing to charge that to constitute theft the taking must be private. In theft, in this state, the taking must be private. The statute says "steal." To steal is to take privately. A felonious intent and an intent to take publicly are not consistent with each other. The court did not so charge, but told the jury, in substance, that any taking, with intent to deprive the owner of his property, and to procure gain to the taker, was a theft. His definition of felonious intent is erroneous. *Regina v. Holloway*, 3 Cox C. C., 241; *Ransom v. State*, 22 Conn., 156.

6. In refusing to charge as requested concerning taking by fraud. There was no evidence of any fraud preceding or accompanying the taking. Fraud is an act or word, and not a mere state of mind. The court told the jury, in substance, that the purpose in Fenn's mind, at the time of the passive reception of the note, could convert such passive reception into an active taking; and that a felonious intent existing in the mind is all that is necessary to make the reception or possession a sufficient taking to constitute theft. This was erroneous.

*Foster*, state's attorney, and *Doolittle*, *contra*, cited with regard to the sufficiency of the description of the note in the information, 3 Chit. Crim. Law, 975; 1 Whart. Crim. Law, §§ 317, 355, 358; *Commonwealth v. Richards*, 1 Mass., 337, and *Salisbury v. The State*, 6 Conn., 101; and as to the offense being larceny, 2 Stark. Ev., 607, and 3 Greenl. Ev., §§ 157, 160.

PHIELPS, J. The defendant moves for a new trial for a verdict against evidence, and for the admission by the court of certain testimony offered by the state and objected to by him; and also for sundry alleged errors of the court in its instruction to the jury.

1. We are satisfied from the testimony recited in the motion that the verdict is not so manifestly against the weight of evidence properly admitted in the cause, as to require us, on that ground, to set aside the verdict.

The state was bound to prove the felonious intent by the defendant at the time of the taking of the property, that it was of some actual and intrinsic value, and was the property of the person named as owner in the information, and that it was taken by the defendant either secretly and without the knowledge of the owner, or openly by deception, artifice, fraud or force, and with the design then entertained to deprive the owner of it and secure to himself some personal benefit from the wrongful taking. We think the evidence detailed in the record justified the jury in finding all these propositions proved. The direct proof of the value and ownership of the note was not in itself necessarily conclusive, but we think it was so far corroborated by the circumstances, and especially by the conduct of the defendant, that we cannot properly say the verdict with respect to those allegations was unwarranted.

2. The note was proved, on the trial, to have been payable with semi-annual interest, and all taxes that should be assessed on the amount of money represented by it. The description of it in the information omitted these particulars, and the defendant objected to the evidence descriptive of the note, on the ground of a material and fatal variance.

In a prosecution for theft, the property alleged to have been stolen must be described with substantial accuracy, so that its identity shall be unquestionable and the defendant thereby protected from another prosecution for the same offense. We think that it was reasonably done, and that the defendant who wrongfully took the note and destroyed it should not be permitted to say it was not described with the utmost particularity. There is nothing in the circumstances which indicates any danger of his being subjected to another prosecution by reason of such incomplete description, and the attorney for the state has carefully

inserted in one of the counts in the information the usual averment in such cases, that a more particular description of the property was to him unknown.

A similar objection was taken to evidence showing the precise form of the indorsements of the notes by the payee and indorsee, on the ground that the information did not state the *form* of the indorsement by the payee, or that the indorsee who was the owner had indorsed it at all. Sufficient was alleged to show that the title passed by indorsement from the payee to the indorsee, and as the latter was alleged to be the owner, the question whether he had written his name on it by way of a blank indorsement without delivery could not in this case be material. The question was one of title, and his placing his name for the purpose of collection on the back of a note payable to his order would not affect that, and as a matter of mere technical form was unimportant.

3: A large number of objections are taken to the instructions given by the court to the jury. Those relating to the question of variance between the information and the proof are sufficiently noticed and disposed of in what has been already said with reference to the admissibility of the evidence on those points. The other questions made relate to the value and ownership of the note, the manner it was taken by the defendant, and the intent with which it was done. The jury were required to find, under the instructions given them, that the note was of some substantial value; that Warner was the owner of it when it was taken by the defendant; that the taking was either secretly done, or openly, by fraud or force, and in either mode, with the felonious intent to deprive the owner of his property in it, and convert it to the private advantage of the defendant. On all these points the law was fully, plainly and correctly stated, and the defendant has no just reason for complaint.

We advise the superior court that a new trial be not granted.

In this opinion FOSTER and PARDEE, JJ., concurred; CARPENTER, J., also concurred, but with hesitation. PARK, C. J., dissented.

NOTE.—In *Hildebrand v. People*, 56 N. Y., 394, which was a prosecution for larceny, the following is the statement of facts and the decision of the court by CHURCH, C. J.: "The prosecutor handed the prisoner, who was bar-tender in

a saloon, a fifty dollar bill (greenback) to take ten cents out of it in payment for a glass of soda. The prisoner put down a few coppers on the counter, and when asked for the change, he took the prosecutor by the neck and shoved him out doors and kept the money.

"The question is presented on behalf of the prisoner whether larceny can be predicated upon these facts. There was no trick, device or fraud in inducing the prosecutor to deliver the bill; but we must assume that the jury found, and the evidence was sufficient to justify it, that the prisoner intended at the time he took the bill, feloniously to convert it to his own use.

"It is urged that this is not sufficient to convict, because the prosecutor voluntarily parted with the possession not only, but with the property, and did not expect a return of the same property. This presents the point of the case. When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without trespass (43 N. Y., 61). But in this case I do not think the prosecutor should be deemed to have parted either with the possession of, or property in, the bill. It was an incomplete transaction to be consummated in the presence and under the personal control of the prosecutor. There was no trust or confidence reposed in the prisoner, and none intended to be. The delivery of the bill and the giving change were to be simultaneous acts, and until the latter was paid, the delivery was not complete. The prosecutor laid his bill upon the counter, and impliedly told the prisoner that he could have it upon delivering to him \$49.90. Until this was done neither possession nor property passed; and in the mean time the bill remained in legal contemplation under the control and in the possession of the prosecutor." It was accordingly held that the facts stated were sufficient to sustain a conviction for larceny, and judgment was affirmed.

In *People v. Call*, 1 Denio, 120, the defendant took a promissory note to indorse a payment of interest upon it, in the presence of the owner of the note, and then carried it off, and it was held that he was rightly convicted of larceny. In *Com. v. Wilde*, 5 Gray, 83, where a shopman placed some clothing in the hands of a customer, but did not consent that he should take it away from the shop till he should have made a bargain with the owner, who was in another part of the shop, his carrying it off was held to be larceny. In *Vaughan v. Com.*, 10 Grat., 758, the facts were as follows: The prisoner had executed a bond for \$25.00 which became the property of one Keyser. The prisoner told Keyser that he would pay it if he would bring it with him to a certain religious meeting which both expected to attend. They met at the appointed time, and the prisoner taking the bond into his hands, as Keyser supposed to examine it, immediately destroyed it. There was evidence to show that the prisoner thought himself unjustly treated in the matter in which the bond was given. *Held* that he was rightly convicted of larceny. So in *Farrell v. People*, 16 Ill., 506, where the evidence showed that one Hennis, about midnight, gave Farrell, who was a hack driver, a five dollar bill to be changed, in order that Hennis might pay Farrell twenty-five cents, and Farrell did not return with the bill or the change for it, it was *held* that he was rightly convicted of larceny.

So in *Reg. v. Middleton*, 12 Cox, C. C., 260, 417 (S. C., 1 Green Crim. Cas. 4), it appeared that a depositor in a post office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post office, who, instead of referring to the proper letter of advice for 10s., re-

ferred by mistake to another letter of advice for 8*l.*, 16*s.*, 10*d.*, and placed that sum upon the counter. The clerk entered 8*l.*, 16*s.*, 10*d.* in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the postmaster general when he took it up, and found him guilty of larceny. It was held by eleven of the fifteen judges who sat on the case that he was properly convicted of larceny. Four of the judges dissented on the ground that the money was not taken *inuito domino* and therefore there was no larceny.

In *Reg. v. Slowly*, 12 Cox C. C., 269 (S. C. 1 Green Crim. Cas., 30), it appeared that the prosecutor sold onions to the prisoner, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoner, and the prosecutor was then induced to make out and sign a receipt which the prisoner got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoner of larceny, and said that he never intended to pay for the onions, and that the fraud was meditated from the beginning. It was held that the conviction was right.

In *Com. v. Concannon*, 5 Allen (Mass.), 502, it appeared that a mortgagee had sent the mortgage to the register of deeds' office for record, but had not sent the fees, and therefore it was not recorded. The mortgagor, coming into the office, was informed by a clerk that the mortgage had been sent in for record. He told the clerk that he had been unfairly treated about the mortgage, and said that he did not want it recorded. The clerk then handed him the mortgage and asked him to take it to the mortgagee. He never delivered the mortgage to the mortgagee, and on these facts, was indicted for embezzlement. On the trial there was evidence to show that the mortgagor did not owe the full amount of money named in the mortgage. It appeared also on the part of the defendant, that he had been advised by his attorney to place the mortgage in the hands of a third person for safe keeping, until it could be settled to whom it fairly belonged, and that he had done so. In reply to this, evidence was allowed to be introduced, under objection, to show that in the mean time the defendant had made, and put upon record, a deed of the estate to a third person, making no reservation in relation to the mortgage. On this evidence the trial judge instructed the jury that if the defendant reasonably and in good faith believed that he was entitled to keep the mortgage, he was not guilty of embezzlement, however unfounded his belief might be, but if he knew that the mortgage was the property of the mortgagee, the fact that he thought it was unjust and ought not to be enforced did not prevent his act amounting to embezzlement, if at the time he received it he had the intent to deprive the mortgagee of it permanently. The defendant was convicted and the evidence was held sufficient to support the conviction, and the instructions correct. But in *State v. Deal*, 64 N. C., 270, where it appeared that the maker of a note, who had complained that he had not been fairly dealt with in the transaction in which the note was given, went to the holder, and after proposing to pay it in cotton, which was refused, asked to see it, and upon its being delivered to him by the holder, kept possession of it, saying, "You won't get it again;" and upon a struggle ensuing, snatched up an axe, retreated to his horse, and then rode off, adding, "Tom (the holder's son, and as surety to the note) sent me word to get the note as I could," it was held there was no larceny.

THE QUEEN *vs.* GUMBLE.

(2 Crown Cases Reserved, 1.)

LARCENY: *Indictment—Amendment—Money—14 and 15 Vic., ch. 100, secs. 1, 18.*

The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign: *Held*, that by 14 and 15 Vic., ch. 100, sec. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence," and that by sec. 18, the indictment so amended was proved.

CASE stated by the chairman of the *Surrey* Quarter Session.

At the general quarter session of the peace, holden by continuance at St. Mary, Newington, in and for the county of Surrey, on the 3d of July, 1872, James Gumble was indicted for stealing, on the 29th of May, 1872, nineteen shillings and sixpence, from William Jackson Walton.

The prosecutor had been playing at throwing sticks at cocoa nuts on Epsom Downs, and had to pay the prisoner sixpence, but having nothing less than a sovereign, he said to the prisoner, "Have you change for a sovereign?" The prisoner said, "Yes," and in consequence of that, prosecutor gave him a sovereign. He then pulled some money out of his pocket, and said, "I have n't enough, I'll go and get it for you; I won't be a minute, just wait here." The prosecutor waited nearly an hour for the prisoner, and then went for a policeman, leaving a friend who had been with him all the time to wait for the prisoner. This he did for quite another hour after the prosecutor went for a policeman. The prisoner's son removed the sticks and cocoa nuts at the expiration of the first hour. The prisoner did not return, and was not apprehended until the following Saturday, the 1st of June, on which occasion when he saw the prosecutor's friend, he immediately ran away, and was only captured after a chase of some distance. On his apprehension, 4*l.*, 10*s.*, was found on him.

It was objected by the prisoner's counsel that there was no case against the prisoner, for if he were guilty of any offense, he was guilty of stealing a sovereign, and that the court had no power to amend the indictment.

The court allowed the case to go on, and put it to the jury,

that if they believed that the prisoner, at the moment of obtaining the sovereign, intended by a trick feloniously to deprive the prosecutor of the possession of the sovereign, they were to find him guilty. They found him guilty, and then the question were reserved for the decision of the Court for Crown Cases Reserved, as to whether the prisoner, being found guilty of stealing a sovereign, could rightly be convicted under an indictment charging him with stealing nineteen shillings and sixpence, and also, whether the court would have had the power to amend the indictment at an earlier stage of the case.

No counsel appeared for the prisoners.

*John Thompson*, for the prosecution.

If there be any variance between the indictment and the proof, the indictment might, by 14 and 15 Vict., ch. 1, sec. 1,<sup>1</sup> be amended by inserting the word "money," as the description of the thing stolen. That would make the indictment good within sec. 18, and, upon the case as stated, this amendment must be taken to have been made at the trial before verdict.

KELLY, C. B. We are all of the opinion that there was power to amend, if any amendment be necessary; and that, on the case as stated, we must take that to have been done, if it be necessary.

MARTIN, B. I think there was power to amend, and that may be done by altering the description to "money" simply, which makes the conviction good.

BRETT, J. The defect, if there be one, is one of description,

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<sup>1</sup>By 14 and 15 Vict., ch. 100, sec. 1: "Whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof . . . in the name or description of any matter or thing whatsoever therein named or described, . . . it shall and may be lawful for the court before which the trial shall be had . . . to order such indictment to be amended. . . ."

By sec. 18: "In every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or of any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank notes, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved. . . ."



and may be amended by describing the things stolen as "money." And, on the case, we must take this amendment as made before verdict.

GROVE and QUAIN, JJ., concurred.

*Conviction affirmed.*

Attorneys for prosecution, *Rogers & Sons.*

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STATE *vs.* DAVIS.

(38 N. J., 176.)

LARCENY: *Evidence — Animus furandi.*

On a prosecution for stealing a horse and carriage, evidence that respondent, a young man, passing along the street late at night, seeing the horse and carriage standing in front of the owner's house, got in and drove off, and that the horse and carriage were found abandoned in the road next day several miles from where they were taken, the horse much exhausted from driving, and that respondent gave no notice to the owner or to any one where they might be found, is sufficient to sustain a verdict of guilty.

Fraudulently taking the personal property of another without his consent, with a felonious intent to deprive him wholly of his property, although the taker designs, himself, to make but a temporary use of the property, is sufficient evidence of the felonious intent required to constitute the crime of larceny.

SCUDDER, J. The defendant, who is quite young, in passing along the street near midnight, February 22, 1875, saw the carriage of Dr. Charles Hodge, Jr., standing in front of his residence. He and a companion took the horse and carriage, drove rapidly away in a reckless manner, and about ten o'clock the next day the horse and carriage were found abandoned several miles away from where they were taken. They were found in the road, the horse much exhausted from driving and want of food. The prisoner did not return the horse and wagon to the owner, or make any effort to do so, or apprise anyone where they could be found, or to whom or where they belonged. He did not even put them in some secure place, where the owner might find them. These acts were perfectly consistent with an intent originally to deprive the owner of his property; but finding them a dangerous possession, and becoming frightened, they

were abandoned when detection became imminent. His conduct was utterly reckless of the rights of the owner; but was it criminal, and does it sustain the finding that he was guilty of larceny?

The principles which must determine this case are fully discussed by Chief Justice Green, in *State v. South*, 4 Dutch., 28, and, as is his wont, he leaves but little to find on the subject, for those who come after him as gleaners.

The question in the case was, whether the fraudulently depriving the owner of the temporary use of a chattel can constitute larceny at the common law; whether the felonious intent, or *animus furandi*, may consist with an intention to return the chattel to the owner. It was there held, that if the property was taken with the intention of only using it temporarily, and then returning it to the owner, it is not larceny; but if it appear that the goods were taken with the intention of permanently depriving the owner of his property, then it is larceny, and that this intent is a fact to be decided by the jury from the evidence.

The question therefore, in this case is, whether there are facts shown from which a jury should infer that it was the intention of the defendant to permanently deprive the owner of his property.

A man's intention must be judged by his acts and expressions; and it is manifested by circumstances that vary with almost every case that is presented for consideration. The general rule to determine what he intends by his acts is, that a man intends that consequence which he contemplates, and which he expects to result from his act, and he therefore must be taken to intend every consequence which is the natural and immediate result of any act which he voluntarily does. 2 Stark. Ev., 573.

When, by the voluntary act of this defendant, the horse and carriage were loosed from their hitching place in front of their owner's door, and driven away in the night, and after many miles and hours of reckless driving, were left in the public road, did the taker contemplate, and was the natural and immediate consequence which he should be presumed to contemplate at the time of taking, that the owner would be permanently deprived of his property?

It is not his intention at the time of the abandonment, but the purpose at the time of the taking that we must seek; for an

article may be taken with intent to steal, and afterwards abandoned on pursuit, or from a mere change of purpose, yet the taking will be larceny. I think that fraudulently taking the personal property of another without his consent, and with no intent at the time of taking to return the same, is evidence of such intent to deprive the owner of his property; that a jury not only could, but should find the taker guilty of larceny.

It is not a mere temporary taking which may consist with an intent to return, but a taking what may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner. An abandonment to mere chance is such reckless exposure to loss, that the guilty party should be held criminally responsible for an intent to lose.

If a person take another's watch from his table, with no intent to return it, but for the purpose of timing his walk to the station to catch a train, and when he reaches there, leaves it on the seat, for the owner to get it back or lose it, as may happen; if a man takes another's axe with no intent to return it, but to take it to the woods to cut trees, and after he has finished his work, cast it in the bushes, at the owner's risk of losing it, such reckless conduct would be accounted criminal. It is true that the probability of finding the horse and wagon may be greater than that of recovering the watch or axe, because they are larger and more difficult to conceal, but the intent is not to be measured by such nice probabilities, rather by the broader probability that the owner may lose his property, because the taker has no purpose of ever returning it to him.

The cases that are most frequently cited in opposition to this view are, *Phillips & Strong's Case*, 2 East P. C., ch. 16, § 98. Here the horses were taken to and in a journey, and left at an inn. The jury found the prisoners guilty, but added they were of opinion that the persons meant merely to ride them to Leedsdale and leave them there, and that they had no intention to return them or to make any further use of them. The court said that if the jury had found the prisoners guilty generally upon the evidence, the verdict could not have been questioned, but as they found specially from the facts that there was no intention in the prisoners to change the property, or make it their own, but only to use it for a special purpose to save their labor in traveling, it was only a trespass and not a felony. The express

intention found was inconsistent with the general finding. Yet the facts were sufficient to sustain a general verdict of guilty of larceny. The court were divided on the effect of this special finding.

In *Rex v. Crump*, 1 C. & P., 658 (11 E. C. L.), the prisoner took a horse with other property, and after going some distance turned the horse loose, proceeded on foot and attempted to dispose of the other property. It was left to the jury to say whether he intended to steal the horse or to use him to carry off the plunder. He was found not guilty of stealing the horse, and guilty of stealing the other property.

It was said that he distinctly manifested his purpose of converting the other articles to his own use by offering them for sale. It is odd that such a nice distinction and division of intention should be made dependent on the kind of property taken at the same time.

Lord DENMAN said, in *Regina v. Holloway*, that if a man took another's horse without leave, intending to ride it at every fair in England (which would take him a year), and then return the horse at the end of that time, it would not be larceny. This was the statement of an extreme case by way of illustrating a principle, and there was here a purpose to return to the owner.

In *Rex v. Cabbage*, R. & R. C. C., 292, the prisoner went to a stable door, forced it open, took the horse out, went some distance along the road until he came to a coal pit, and then backed the horse in the pit, where he was found dead. It was held that it was not essential, to constitute the offense of larceny, that the taking should be *lucris causa*; that taking fraudulently, with an intent wholly to deprive the owner of the property, was sufficient, and the prisoner was convicted.

These cases will be sufficient to illustrate the principles and distinctions upon which this case will be decided.

It is conceded that the law is settled with us according to the rule of the common law, and the approved definition of larceny, given by Mr. East in East's P. C., ch. 16, § 1, where it is said to be "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." And it has been uniformly held that the feloni-

ous intent must manifest a purpose to deprive the owner wholly of his property.

The definition given by EYRE, B., *Pear's Case*, East's P. C., ch. 16, § 12, that larceny is the wrongful taking of goods with intent to spoil the owner of them *causa lucri*, would seem to be too narrow, because the law considers not only and always the effect of gain to the taker, as an essential to the crime, but also the deprivation to the owner of his property. Either will be sufficient in the evidence of larceny. 2 Arch. Cr. Pr. & Pl., 389-392.

It is interesting, however, to notice the broader definition of theft or larceny in the civil law, and how nearly it accords with the efforts to reach, by criminal punishment, the reckless temporary use and abuse of the property of others, by taking from an owner who does not consent.

*Just. Ins., lib. 4, tit. 1*, thus defines it: *Furtum est contractatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve; quod legi naturali prohibitum est admittere.*" Thus, not only the fraudulent taking of the thing itself, but the using and possessing anything by fraud for the sake of gain, was theft by the civil law. But this does not agree with the law as settled in our common law courts, and the taker must intend to deprive the owner wholly of his property.

This is the conclusion to which Chief Justice GREEN came, as it appears reluctantly, in the case of *The State v. South*, and against which Judge SHARSWOOD protests in the note to *Queen v. Halloway*, 1 Den. C. C., 376, reasoning strongly for an extension of the definition of larceny.

Doubtless the severe punishment of felony under the old English law has led to this more restricted construction, but the lighter penalties which now are inflicted would seem to make an extension of the crime of theft or larceny desirable, even to the limits of the civil law definition.

There has been no case decided in this state that has held that where the taker had no intention to return the goods the taking was merely temporary. Nor is there anything that should control the action of a jury, or the court acting as such under the statute, when they find that the party having no such intent is guilty of larceny. It would be most dangerous doctrine to hold that a mere stranger may thus use and abuse the property of an

other, and leave him the bare chance of recovering it by careful pursuit and search, without any criminal responsibility in the taker.

The court of quarter sessions are advised that the verdict is right, and should not be disturbed.

NOTE. — In *McCourt v. People*, 64 N. Y., 583, decided in the New York court of appeals, April, 1876, the facts were as follows: The respondent, with two others, stopped at a house where he had before procured cider and asked the daughter of the prosecutor to sell him some cider. She refused. The respondent said he would have some any way, and in defiance of an express prohibition, went into the cellar and drew some cider in a pail, which was taken away from him by one of those who came with him before he left the premises. Respondent was partially intoxicated at the time. It was *held* that on these facts there was no larceny and the respondent was entitled to a positive direction to the jury to acquit. The court say "There was an absence of the circumstances which ordinarily attend the commission of a larceny and which distinguish it from a mere trespass. There was neither fraud, stratagem nor stealth. The value of the cider which he intended to take was trivial, and the whole transaction was open, in the day time, and in the presence or within the observation and knowledge of the prosecutor's daughter. \* \* \* We cannot sustain the conviction, without founding the distinction between criminal acts, and such as, however, reprehensible, involve only a violation of private rights, and injuries for which there is a remedy only by civil action.

"The refusal of the court to direct an acquittal was error, for which the conviction should be reversed."

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### REGINA vs. HENNESSY.

(35 U. C. Q B., 603.)

LARCENY IN THE UNITED STATES: *Conviction in Canada—32-33 Vic., ch. 21, sec. 112, D.*

The prisoner, being the agent of the American Express Company in the state of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry of its receipt in their books, as it was his duty to do, and afterwards absconded with it to this province, where he was arrested. *Held*, that he was guilty of larceny, and was properly convicted here under 32-33 Vic., ch. 2, sec. 112, D.

CRIMINAL CASE reserved. The prisoner was tried and convicted before BURTON, J., at the last York Assizes, under the statute 32-33 Vic., ch. 21, sec. 112, D., for bringing into Canada or having in his possession therein certain property stolen in the

state of Illinois, one of the United States of America, in such manner that the stealing or obtaining it in a like manner in Canada would by the laws of Canada be a felony or misdemeanor.

The indictment contained three counts, one charging him with having stolen the property in a foreign country, and subsequently bringing it into Canada, the second with having so stolen it and subsequently having it in Canada; and the third for larceny in Canada.

The evidence disclosed that the prisoner was on the 3d July last the agent of the American Express Company at Winona in the state of Illinois, and that on that day, at about 2 P. M., one Charles Ames, a grain buyer there—and having a branch house at Long Point, in the same state, at which place one Taggart was his agent, having occasion to remit to his agent, put up \$700 in United States currency or greenbacks in an envelope, and took it to the office of the said express company at Winona, and delivered the package to the prisoner, who sealed it up, the money having been put up into the envelope in his presence, and then sealed up by him, and he gave a receipt for it and the package so sealed was addressed to the agent Taggart at Long Point, who was at the same time advised by post and telegraph of the money having been sent; and this course of dealing had prevailed for some time previously.

Ames was advised by his agent that the money had not arrived, and he called at the express office, but the prisoner had then left, and he never saw him afterwards, until he was in custody.

The evidence further disclosed, that another parcel had been sent down for collection through the American Express Company at Winona, on some one at Layton, and was sent to the United States Express Company at that place, who collected \$5,720, in greenbacks, and remitted to their agent at Winona, who received it, and handed it to Mr. Dennis, a clerk of the prisoner, in his presence, in the office of the American Express Company; and the United States Express Company got a receipt in the presence of the prisoner for the collection of \$5,720, and the clerk gave the package containing the money to the prisoner, who put it into the company's safe. This was about 11 o'clock on the 3d July last.

It was the prisoner's duty to make the entry in the receiving



book of all moneys received in packages received for transmission.

The package for \$700 should have been entered, but there was no entry of it, and the \$5,720 should also have appeared in the book, but was not entered.

On the same day the prisoner left Winona on a stock train at 5 P. M., and went through to Toronto, where he arrived on the morning of the 6th, and where he disposed of American currency to the extent of some \$5,000 or \$6,000, and went on to Montreal, where he was arrested.

The jury convicted, and were requested to find, under a charge not complained of, whether the prisoner was guilty of larceny or embezzlement, and found him guilty of larceny.

It was objected that the evidence disclosed, if any offense, that of embezzlement, and not of larceny, in the foreign country, and that the prisoner could not be convicted on this indictment, which charged him with bringing into Canada property stolen in such foreign country.

The learned judge sentenced the prisoner to three year's imprisonment in the provincial penitentiary, but at the request of the prisoner's counsel, reserved the question for the consideration of the court of queen's bench. If the court should be of opinion that the facts proved did not amount to larceny, and that the prisoner could not, under the indictment and the evidence, be legally convicted of bringing goods into Canada as stolen, the prisoner was to be discharged, otherwise the sentence was to be carried out.

The case was argued in Michaelmas term, 25th of November, 1874, *Harrison*, Q. C., for the prisoner. The conviction cannot be supported. The question is, What was the design in the original taking? Was there an *animus furandi*? We say that none has been shown. The disposal of the property in Canada cannot affect the question. No stealing has been proved against the prisoner, but only an embezzlement, and the conviction is, therefore, bad. The prisoner was indicted under 32-33 Vic., ch. 21, sec. 112, D., for larceny of property taken from Michigan, in the United States. The *People v. Williams*, 9 Am. R., 119; 24 Mich., 166, is directly in point; and *Regina v. Thorpe*, 1 Dears. & B., 562, and *Regina v. Roberts*, 3 Cox C. C., 74, may

also be cited to support our contention. See also *Commonwealth v. Simpson*, 9 Mete., 138, 143.

*K. Mackenzie, Q. C., contra:* The case of *Regina v. Wright*, 1 Dears. & B., 431, is exactly this case and supports the prosecution. The evidence plainly proves that the money found in the prisoner's possession was that which had been stolen. The fact is admitted by the prisoner. The sole question is, Should the conviction be for larceny or embezzlement? We insist on the third count, *i. e.*, for stealing in Canada. He referred to *Regina v. Watts*, 2 Den. C. C., 14; 32-33 Vic., ch. 21, sec. 4; Rosev. Crim. Ev. (8th ed.), 642, and cases there collated.

December 22, 1874, RICHARDS, C. J. We have looked at all the cases referred to by Mr. Harrison in his argument, and to some others, in which very able judgments were given by judges in the state courts of the United States.

It appears that in most of the New England states, which were British colonies before the treaty of 1783, the practice which prevailed before the recognition of the independence of the United States, of indicting offenders who had stolen property in one province and brought it into another, has been continued since the adoption of the constitution of the United States. But some of these states decline to act on the principle that the bringing of stolen property from another country by the thief into their state constitutes a new taking, so as to make the larceny an indictable offense there.

The general doctrine in our courts is, that in criminal matters no man is, in the absence of express law, punishable in one country for acts done by him in another, and the cases cited by Mr. Harrison show that this, in England, not only applies to a larceny committed in France, when the thief brought the property into England, but also to larceny committed in the Island of Jersey, when the stolen property was brought into an English county.

We suppose the definition of larceny by GROSE, J., in *Hammonton's Case*, 2 Leach, 1089, is sufficiently certain, viz.: "The felonious taking of the property of another without his consent and against his will, with the intent to convert it to the use of the taker."

The doctrine was established long ago that larceny, like every other offense, must regularly be tried in the same county or jurisdiction in which it was committed; but the offense was considered as committed in every county or jurisdiction into which the thief carried the goods, for the legal possession of them still remained in the true owner, and every moment's continuance of the trespass and felony amounts to a new caption and asportation. To this, however, there were some exceptions. If the original taking be such whereof the common law cannot take cognizance, as if the goods be stolen at sea, the thief cannot be indicted for the larceny in any county into which he may carry them. 3 Inst., 113; 1 Hawk. P. C., 151, sec. 52.

A similar exception prevailed formerly when the original taking was in Scotland or Ireland. And it appears to have been holden that a thief who had stolen goods in Scotland could not be indicted in the county of Cumberland, where he was taken with the goods. *Rex v. Anderson*, 2 East, P. C., 772.

The statute of the Imperial Parliament, 7 and 8 Geo. IV., ch. 29, in effect removed the exception as to larcenies committed in the United Kingdom.

But this did not apply to the case of goods stolen on the island of Jersey, when the thief had them in his possession in the county of Dorset, in which he was indicted and convicted, because the original taking was such whereof the common law could not take notice, and the island of Jersey not being considered a part of the United Kingdom, the case was not within the statute, 7 and 8 Geo. IV., ch. 29, sec. 76, and so the conviction was held bad. *Rex v. Prowes*, 1 Moo. C. C. 349. So also as to the island of Guernsey. *Regina v. Debruiel et al.*, 11 Cox C. C., 207.

Felonies and misdemeanors committed within the jurisdiction of the admiralty are to be tried in those courts, under the provisions of several different statutes. 7 and 8 Geo. IV., ch. 29, sec. 76, Imp. Par., enacted, "That if any person, having stolen or otherwise feloniously taken any chattel . . . or other property whatsoever in any one part of the United Kingdom shall afterwards have the same property in his possession in any other part of the United Kingdom, he may be dealt with, indicted, tried and punished for larceny or theft in that part of the United Kingdom

where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part."

The section goes on to make similar provision as to receivers of stolen goods.

The Dominion Statute, 32-33 Vic., ch. 21, sec. 121, makes provisions to the same effect as those contained in the Imperial Statute, 24 and 25 id., ch. 96, sec. 114; and as to similar offenses committed in any part of Canada, they may be tried in any other part of the dominion, where the thief has the stolen property in his possession, in the same manner as if the theft had been committed there.

Section 112 of the same act provides, "If any person brings into Canada, or has in his possession therein any property stolen . . . in any other country, in such manner that the stealing . . . would, by the laws of Canada be a felony, . . . then the bringing of such property into Canada . . . shall be an offense of the same nature, and punishable in like manner as if the stealing . . . had taken place in Canada, and such person may be tried and convicted in any district, county or place in Canada into, or in which he brings such property, or has it in possession."

I am not aware of any English statute which contains a similar provision. It is very like the law existing in the state of Michigan, referred to in the case of *People v. Williams*, 24 Mich., 156; 9 Am. R., 119, cited by *Mr. Harrison*.

*Mr. Harrison*, in his argument, seemed to be under the impression that the facts proven showed a taking by a servant when he was indicted for embezzlement, and that the conviction for larceny was bad because the evidence in fact only showed an embezzlement.

The facts, however, stated in the case, as submitted to us, seem to have been that certain moneys were received by the prisoner, an agent of the American Express Company at Winona, in the state of Illinois; the money having been handed to a clerk of the prisoner's, in his presence, in the office of the express company; a receipt was given for it, and the clerk gave the package containing the money to the prisoner, who put it into the company's safe about 11 o'clock on 3d of July. The prisoner's duty was to make an entry in the receiving book of all moneys re-

ceived in packages for transmission, but there was no entry of it in the book. On the same day the prisoner left Winona on a stock train at twenty minutes past five o'clock in the afternoon, and went through to Toronto, where he arrived on the morning of the 6th, and disposed of American currency to the extent of some \$5,000 or \$6,000.

The jury were requested to find whether he was guilty of larceny or embezzlement, and they found him guilty of larceny, no objection being made to the charge of the learned judge, further than that the evidence disclosed, if any offense, that of embezzlement, and not larceny in the foreign country, and that the prisoner could not be convicted on that indictment, which charged him with bringing into Canada property stolen in such foreign country.

The learned judge sentenced the prisoner to three years imprisonment in the provincial penitentiary, but at the request of the prisoner's counsel reserved the question for the consideration of the judges of this court; and if the court should be of opinion that the facts proved do not amount to larceny, and that the prisoner could not, under that indictment and the evidence, be legally convicted of bringing goods into Canada, as stolen, the prisoner is to be discharged, otherwise the sentence is to be carried out.

The case of *Regina v. Wright*, 1 D. & B., 431, cited by *Mr. McKinzie*, shows that the facts proven on this trial amount to larceny. There the prisoner was a wine merchant, but he was also the local agent of a bank, and received £150 a year as a salary, and was to provide a place for carrying on the business. The office was attached to his own house, in which he carried on his own business of a wine merchant.

The office was fitted up at the expense of the bank, and there was in it an iron safe, provided by, and the property of, the bank, into which it was the prisoner's duty to put any money received during the day, and which had not been required for the purposes of the bank. He sent in statements regularly to the bank, showing money received, on hand and paid out, and specified the notes, cash or securities, and it was his duty to pay over weekly balances he did not want for his purposes. Audits were made from time to time, and the amount of cash on hand examined.

On the 29th of September, 1855, his accounts were inspected, and found correct. From that time to the 7th of September, 1857, he made up his statements regularly, and everything appeared correct, but no audit took place until the 12th of September, 1857, when an appointment was made to examine his cash, when prisoner said he was about £3,000 short, and handed over all he had left, amounting to £775, 10s. He made out an account showing a deficiency of £3,021, 9s., 9d. While before the magistrate he admitted having taken this money.

The learned judge advised the jury to find the prisoner guilty of larceny if they were satisfied that any part of the sum misappropriated had at any time within the two years been taken from the money sent by the branch bank to the prisoner, or from money which, having been received from customers, had, before such taking, been placed in the safe, and included in the weekly accounts furnished by the prisoner.

The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers, which, before such stealing, had been placed in the safe, and made the subject of a weekly account. They did not find the prisoner stole any of the money which had been sent to him from the branch bank.

LORD CAMPBELL, in giving judgment, said, at p. 441: "When the money was placed in that safe, which was furnished by the employer, and of which the employer had a duplicate key, the exclusive possession of the prisoner was determined. The money being so deposited in the safe, and afterwards taken out of the safe by the prisoner *animo furandi*, he was guilty of larceny. The safe in this case very much resembles a till in a shop. The shopman has access to the till, and has a right to take money out of it for lawful purposes; but if he takes it out *animo furandi*, he is a thief."

COLERIDGE, J., MARTIN, B., CROWDER, B. and WATSON, B., each gave judgments concurring in the same view.

It appears to us the principle in that case clearly applies to this. The prisoner was shown, by the evidence, to have been the agent of the express company, who were the bailees of the money, and he put it into their safe, and there was evidence to go to the jury to show that afterwards, he stole it out of the safe, and brought it to this city.

He therefore brought into Canada property stolen in another country, in such a manner that the stealing would, by the laws of Canada, be a felony, and the statute declares that to be an offense of the same nature as if the stealing had taken place in Canada.

The first count of the indictment charges him with having stolen the property in a foreign country, and with subsequently bringing it into Canada, and the jury have found him guilty of this offense.

As we understand the objection which is urged by the prisoner, it is simply that the facts show embezzlement, and not larceny. The case cited shows it is larceny, and that seems to us to be the end of it.

It is not urged, in terms, at all events, that affirmative evidence must be given to show that stealing by a clerk or agent from his employer of money which has come into the possession of the latter, is, by the laws of the state of Illinois, larceny.

We do not feel inclined to suggest such a point for the benefit of any person who may be shown to have done this thing, whatever we may call it.

We should say, if it were shown that in the city of Chicago, while a man was riding in a street railway car, one of the passengers sitting beside him adroitly took his watch out of his pocket, and left the car, taking passage on the next train for Toronto, and on reaching this city, sold the watch here, that he had brought stolen property into Canada, without showing affirmatively there was any law in Illinois saying that such an act was larceny.

If a servant were to take his master's money out of a till in his shop in Chicago *animo furandi*, and brought it here, we should say that in bringing that money he was bringing stolen money into Canada; and the same principle, we think, extends to the prisoner in this case.

In discussing the question of the examination of a witness in a foreign country, under a commission, as in *Lumley v. Gill*, 3 E. & B., 114, Lord CAMPBELL said, at p. 124: "The statute will reach a British subject committing perjury in a foreign country. We certainly do legislate so as to make some acts done in foreign countries penal here, as in the case of murder and



slave trading. But then our legislation applies only to British subjects."

Sir A. COCKBURN, then attorney general, in argument said: "In all civilized countries there is some punishment for wilful false evidence."

*Smith v. Collins*, 3 U. C., 1, where, in an action of slander and charge was, that plaintiff had stolen a cow in the United States, Sir J. B. ROBINSON said, at p. 3: "It is true that we do not recognize the criminal law of foreign countries, and therefore it is argued that we cannot be certain that, by the laws of the United States, a man who has stolen a cow . . . would be liable to any corporal punishment. The same might be said of words imputing murder, forgery, or arson. But surely we may infer that in any civilized community which has laws, and property to protect, to steal must be an offense of a very grave character. How they may punish it we may not precisely know. But I think the good sense of the rule, as now maintained, is, that the charging a man with committing abroad such a crime as would subject him to the punishment of felony here, by the common law, fixes with equal certainty the character of the imputation, and places the man in fully as degraded a position in society."

Our parliament has not declared that larceny in the state of Illinois is a crime here, but that the bringing of the property stolen in another country into this country, when that property was stolen in such a manner as would have made it a felony here, is an offense of the same nature as if such stealing had taken place here.

We recognize the rights of the owners to their property when a trespasser brings it into this country. The fact that a thief brings it here does not deprive the owner of his property, and we will aid him to recover the property or its value. We see no good reason for saying that when the thief brings the stolen property into this country, and disposes of it here, that our legislature may not pass a law to punish him for so doing.

We do not think the people of the dominion of Canada should be open to the reproach of being the receivers of stolen goods, or that this country should be an asylum for thieves, and that when they actually bring their plunder here, and vaunt it before

our eyes, we cannot say that any rights, constitutional or moral, are violated in punishing them for it.

*Conviction affirmed.*

## WILLIAMS vs. STATE.

(55 Ga., 391.)

LARCENY: *Consent of owner.*

Where the evidence was that the owner of property, was informed by his agent who had charge of the property, that respondent wanted the agent to join him, respondent, in stealing it, and thereupon the owner told the agent to let the respondent take it, and in pursuance of this arrangement, the respondent came at night and the agent let him have the property, and respondent started off with it, it was *held* that there was no larceny.

Although the owner of property may leave it exposed for the express purpose of trapping one whom he expects to steal it; yet, if he, through an agent, incite a person to take it, the taking is no larceny, for it is by his own consent and procurement.

BLECKLEY, J. 1. The bill of indictment was found by grand jurors, some of whom, after being drawn to serve at that term of the court, had been dropped from the general list of persons qualified and liable to serve as jurors on a revision of the list by the proper officers. This was made a ground of motion to quash the bill. It was promptly overruled for the reason that the revised list was made for the purpose of designating the names from which future juries were to be drawn, and had no relation whatever to the juries which had already been drawn to do duty at the next term of the court — the term at which the indictment was found. Any other construction would subject both the grand jury and the petit juries to a process of disintegration every time a revision of the general list takes place.

2. Another ground of motion to quash was, that the indictment, upon its face, by an entry at the close of it, purported to have been found at October term, 1871. This, also, was properly overruled. This entry was not an essential part of the indictment, and giving that year, instead of the year 1874, was evidently a clerical error. The true date appeared on the minutes of the court, and was reproduced on the back of the indictment.

3. The trial proceeded, and the defendant was convicted. He was charged with stealing thirty pounds of seed cotton of the

value of \$1.00. It appeared in evidence that the cotton was on the owner's plantation, in the possession of his tenant or agent. The agent, during the day, reported to the owner that the defendant wanted to buy or get some cotton, and the owner replied, "Let him have it, and I will be there at the getting." That night, the owner, with a party of friends armed with guns, concealed themselves near the cotton house. As testified by the owner, he was told, at the conversation in the day by his agent, that the defendant would be there that night to get the cotton. He also testified that, on taking his position at night, he called out his agent and asked where the defendant was. Being told that he was in the woods about a quarter of a mile off, he directed the agent to go and tell him to come and get the cotton. The agent went, and after a short absence, returned in company with defendant. Leaving the defendant at the cotton house, within a few steps of where the owner and his party lay concealed, the agent went to his dwelling house, brought out a basket of cotton, delivered it to the defendant, who moved off with it and just then the owner cried "halt," and his party discharged their guns in the air; the defendant dropped the basket, ran off in the darkness, and made his escape. The court charged the jury, in substance, that if the defendant and his associate in the transaction (the owner's agent) united in a common intent to steal the cotton, combining and confederating for that purpose, in executing the common intent, and one of them did the actual taking and carrying, they were both guilty. Also, that if the agent had no intent to steal, but the defendant believed he had, and so combined and confederated with him to steal, and the agent handed him the cotton, and he took it and removed it any distance whatever, he was guilty. There is no evidence in the record upon which to charge the defendant with any taking and carrying away done by his supposed accomplice. The evidence is clear that that person was in mental and moral concert with the owner, not with the accused. It is incredible that he was engaged in stealing during this transaction. There was no guilty taking or carrying done by him, and it was error for the court to make any charge based on that hypothesis. The defendant is responsible alone for such taking and carrying away as were done by himself. According to the evidence, the acts of the counterfeit accomplice proceeded from the joint will of himself and the

accused. He, with the owner, was running on the line of detection and arrest. The accused had a supposed ally, but not a real one; he was running by himself, on the line of guilt and impunity. His pretended accomplice, being a person of sound memory and discretion, could do no act which would render the defendant guilty, for the former was making no effort to become guilty himself. He was, in fact, only a detective, not a thief.

4. The second proposition of the charge is equally erroneous when applied to the facts of this case. The evidence is clear and uncontradicted, that the cotton was delivered by the owner's agent. As testified by the latter, the owner said during the day, "Let him have it, and I will be there at the getting." As testified by the owner himself, he said, at night, "Go and tell him to come and get the cotton." Either of these expressions might, without much strain, be construed into a direction on the part of the owner to deliver the cotton, and it was in fact delivered. There was no trespass committed in the taking. There was no taking without the owner's consent. True, the consent was given for a purpose quite aside from any design to part with the property, but, if given at all, and the intended larceny was cut off as soon as the owner could, after delivery, cry halt, and fire off the guns, what taking was there which could, with any truth, be said to be without his consent? If the property was delivered by the owner's direction, and with his consent, it can make no difference, legally, although it does morally, that the accused did not know of such direction and consent. Suppose the owner, instead of acting by his agent, had acted in person, and delivered the cotton from his own hands, the defendant not knowing him to be the owner, but believing him to be another thief and a confederate with himself in the supposed larceny, would not an essential element of legal larceny be wanting?

5. But were it even granted that the agent made delivery on his own motion, without the owner's consent, there was too much active participation by these two persons in this transaction for it to amount to larceny on the part of the accused. It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete, and if the accused embrace it he will still be criminal. Property may be left exposed

for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take any measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it as a crime, especially where the agent, to whom he has entrusted the conduct of the transaction, puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively and let the would-be criminal perpetrate the offense for himself in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities; 2 Leach, 913; 2 East P. C., ch. 16, sec. 101, p. 666; 1 Car. & Mar., 218; Meigs, 86; 11 Humph., 320; 2 Baily, 569.

It is difficult to see how a man may solicit another to commit a crime upon his property, and when the act to which he was invited has been done, be heard to say that he did not consent to it. In the present case, but for the owner's incitement, through his agent, the accused may have repented of the contemplated wickedness before it had developed into act. It may have stopped at sin, without putting on the body of crime. To stimulate unlawful intentions, with the motive of bringing them to punishable maturity, is a dangerous practice. Much better is it to wait and see if they will not expire. Humanity is weak; even strong men are sometimes unprepared to cope with temptation and resist encouragement to evil.

Let the judgment be reversed.

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COMMONWEALTH *vs.* TITUS.

(116 Mass., 42.)

LARCENY: *By finder of lost goods.*

If the finder of lost goods, at the time of taking them into his possession, knows, or has the reasonable means of knowing or ascertaining, who the owner is, but intends at the time to appropriate them to his own use, and deprive the owner of them, he may be found guilty of larceny.

If the finder of lost goods has no felonious intent at the time of taking them into his possession, a subsequent conversion of them to his own use will not constitute larceny.

This was an indictment for larceny. It appeared by the bill of exceptions that the prosecutor lost the goods while passing along a public highway where they were shortly afterwards found by the defendant. The evidence tended to show that the defendant intended to convert the property to his own use when he first found it, but whether there was any evidence that he then knew who the owner was, or had any means of ascertaining that fact does not appear in the report of the case.

GRAY, C. J. The rulings and instructions at the trial were quite as favorable to the defendant as the great weight, if not the unanimous concurrence, of the cases cited on either side at the argument would warrant.

The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to appropriate them to his own use, and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny.

It was argued for the defendant that it would not be sufficient that he might reasonably have ascertained who the owner was; that he must at least have known at the time of taking the goods that he had reasonable means of ascertaining that fact. But the instruction given did not require the jury to be satisfied merely that the defendant might reasonably have ascertained it, but that at the time of the original taking he either knew, or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession or reach at that time.

It was further argued that evidence of acts of the defendant, subsequent to the original finding and taking, was wrongly admitted, because such acts might have been the result of a pur-

pose subsequently formed. But the evidence of the subsequent acts and declarations of the defendant was offered and admitted, as the bill of exceptions distinctly states, for the single purpose of proving, so far as it tended to do so, the intent with which the defendant originally took the property into his possession at the time of finding it. And the bill of exceptions does not state what the acts and declarations admitted in evidence were, and consequently does not show that any of them had a tendency to prove that intent, nor indeed that any acts were proved except such as accompanied and gave significance to distinct admissions of the intent with which the defendant originally took the property.

*Exceptions overruled.*

NOTE.—In *State v. Weston*, 9 Conn., 527, the evidence tended to show: That the prisoner found a pocket-book, containing money, on the highway, and that the name of the prosecutor was legibly written in the pocket-book in two places. A charge that "if the defendant found the pocket-book and bank bills as claimed by him, and knowing or having the means of knowing, the owner, concealed them and converted them to his own use, instead of giving notice thereof to the owner, he was a thief, and ought to be found guilty," was held correct.

The prisoner found a sum of money on the highway, which he soon after converted to his own use, with various circumstances of falsehood and concealment. On his trial for larceny, the judge instructed the jury that "if the prisoner, at the time of finding the pocket-book, and before he removed the money, knew it to be the property of the prosecutor; or not knowing it to be the property of the prosecutor, if at the time of removing the money, he did it with the intent to convert it to his own use, it was larceny." Of this instruction the supreme court say: "It is on the latter paragraph of this instruction that the doubt of the court arises. Of the correctness of the first part of the instruction, no question exists in the mind of the court. And if the same verdict had been found on that alone, the court might have been entirely satisfied with it. On the other branch of the instruction, the court is divided; on that point no opinion is expressed. But as it is possible the verdict may have been influenced, in some degree, by that instruction, the court is unwilling that the defendant should suffer on a verdict, when the law is at all doubtful. A new trial is therefore ordered without prejudice." *State v. Ferguson*, 2 McMull. (S. C.), 502.

"To constitute larceny in the finder of goods actually lost, it is not enough that the party has general means by the use of proper diligence, of discovering the true owner. He must know the owner at the time of the finding, or the goods must have some mark about them understood by him or presumably known by him, by which the owner can be ascertained. And he must appropriate them at the time of finding with intent to take entire dominion over them." *Hunt v. Commonwealth*, 13 Grat. (Va.), 757. In *State v. Pratt*, 20 Ia., 268, the evidence tended to show that the stolen money belonged to one Dunn; that Dunn had it in his pocket-book in a side pocket, and that it was either taken therefrom, or dropped out and was picked up, by the defendant. On these facts it was held: "that if the defendant picked it up, and with an unlawful intent converted it to



his own use, without the knowledge of the owner, it would be as much larceny or a felonious taking, as though he had taken it from the pocket."

And so in *State v. Cummings*, 33 Conn., 260, where a servant picked up a ring in the house of her mistress, knowing it to have been accidentally dropped by the latter, and to belong to her, and when questioned a few minutes afterwards, denied having taken it, and having concealed it, within a few weeks carried it to a distant city and offered it for sale; it was *held* that the defendant was guilty of larceny.

In the *People v. Anderson*, 14 Johns., 294, the defendant was the *bona fide* finder of a trunk which had been lost from a stage coach in the highway; and it was held that no subsequent act, in concealing or appropriating the trunk to his own use, would make it a case of larceny. The decision proceeded on the ground that the property was lost by the owner, so that it no longer remained either actually or constructively in his possession, and that it afterwards came lawfully into the hands of the defendant by finding.

When property (*e. g.*, a pocket book containing bank bills), with no mark about it indicating the owner, was lost, and found in the highway, and there was no evidence to show that the finder, at the time, knew who the owner was; *held*, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterward.

To render the finder of lost property liable as for a larceny, he must know who the owner is, at the time he acquires possession, or have the means of identifying him *instantly*, by marks then about the property which the finder understands. It is not enough that he has general means of discovering the owner by honest diligence, etc. *People v. Cogdell*, 1 Hill (N. Y.), 94.

It is said in *Randall v. State*, 4 S. & M., 349, that "it is a settled principle of law that if one loses goods and another find them and convert them to his own use, not knowing the owner, this is no larceny. But if the latter knew the owner, or had the means of knowing him, it would be larceny." But in this case this language was a mere *dictum*, for the conviction was reversed on the ground that there was no evidence against the defendant.

In *Ransom v. State*, 22 Conn., 153, the court seems to have gone the whole length of deciding that if the finder of lost goods, at the time of the finding, intends to convert them to his own use, and actually does so, he is guilty of larceny, without regard to the question whether at the time of finding he knew or had the means of discovering the owner. Such knowledge, on his part, seems to be regarded as a mere circumstance bearing on the question of the original felonious intent. But in *Wright v. State*, 5 Yerg., 154, it was *held* that there could be no larceny of lost goods under any circumstances. That to constitute a larceny, there must be a trespass in the taking. That cannot be if the goods were lost, because they would not be in the owner's possession, and no trespass could be committed in taking them. This case follows the case of *Porter v. State*, 1 Mart. & Yerg., 226.

In *State v. Conroy*, 18 Mo., 321, the evidence showed that the defendants found a safe in the Mississippi river, and carried it openly in day light on a dray, to a house in St. Louis, where one of them lived; there they forced the safe open and took out the money, and were dividing it when one of the owners, who had traced them, came in and told them not to interfere with it, for it belonged to the owners of the steamer *Glencoe*. The defendants said they had found it, and claimed they

were entitled to it. The owner went after the police, and on his return found that the men had fled with the money. They were followed and caught in a corn field in which they had concealed themselves, with the money on their persons. It was *held* that on these facts, the defendants were entitled to a positive charge that they were not guilty of larceny. See also *State v. Jenkins*, 2 Tyl. (Vt.), 377.

Larceny cannot be committed of goods and chattels found in the highway, where there are no marks by which the owner can be ascertained. One ingredient of larceny is wanting in such case, to wit: A felonious taking. *Tyler v. People*, Breese (1 Ill.), 227.

The foregoing are all of the American cases of any importance which deal with the question of what constitutes larceny in the finder of lost goods. On these cases we think the weight of American authority is that there can be no larceny unless at the time of finding the goods, the finder knows, or from marks on the goods, or the surrounding circumstances, can then ascertain the owner

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MARTINEZ vs. STATE.

(41 Tex., 126.)

LARCENY: *Property outside of store.*

Stealing property hanging at and outside of a store door is but simple larceny, and is not larceny from a house.

REEVES, A. J. The only question in this case is presented in the brief for the state: "Is an indictment for theft from a house, sustained by proof that the stolen property was taken while hanging at and outside of the store door on a piece of wood nailed to the door, facing and projecting towards the street?"

Burglary at common law is an offense against the security of the habitation, the protection of the property being an incident, not the leading object.

The precinct of the dwelling, the place where the occupier and his family resided, included only such buildings as were used with and appurtenant to it, and these only, were the subjects of burglary at common law, and to constitute this offense there must have been an actual or constructive breaking and entry into the house.

The English definition of burglary has been modified by statute in this and in other states so as to include offenses committed in the daytime as well as in the night, under certain circumstances, and in other buildings than the dwelling house. The

idea of regarding the house as a place of security for the occupants, and a place of deposit for his goods, underlies all these statutes. By our code, burglary is constituted by entering a house by force, threats, or fraud at night, or in like manner, by entering a house during the day and remaining concealed therein until night, with the intent in either case of committing a felony. (Pas. Dig., art. 2359.) It is not necessary that there should be any actual breaking, except when the entry is made in daytime. (Arts., 2360, 2361.)

The code provides different degrees of punishment for theft without regard to place. The article under which the defendant was indicted is as follows: "If any person shall steal property from a house in such a manner as that the offense does not come within the definition of burglary, he shall be punished by confinement in the penitentiary not less than two nor more than seven years." (Art. 2408.) Where the house entered is a dwelling house, the punishment of burglary is imprisonment in the penitentiary not less than three nor more than ten years. Where the house entered is not a dwelling house, the punishment is not less than two nor more than five years. In these cases the punishment is greater than that for theft in general, as defined by the code, where the property is under the value of twenty dollars.

We are of opinion that the goods were not under the protection of the house, so as to make the taking theft from a house in the meaning of the statute, and that the defendant was only liable to the punishment prescribed for simple theft.

The goods were not deposited in the house for safe custody, but the witness says they were hanging out to attract customers or purchasers.

The statutes of the states cited in the brief of counsel, in general, punish theft in a house, while other statutes referred to punish theft from a house as does our code, and they seem to use these terms as meaning the same thing. A different rule would not admit of any definite application.

A construction that would make the stealing of goods while exposed on the street, and not in the house, the same offense as stealing from the house, would be to lose sight of the distinction between different offenses and the different grades of punishment, and would introduce a latitude of construction too

uncertain to be followed in the administration of the criminal laws.

The judgment is reversed and case remanded.

*Reversed and remanded.*

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MIDDLETON *vs.* STATE.

(53 Ga., 248.)

LARCENY FROM HOUSE.

Where a bale of cotton was stolen from an alley way outside of a warehouse and not in a warehouse, it was *held* that the defendant was guilty only of simple larceny.

A charge that "if the bale of cotton was in front of the warehouse, and under its control and protection, stealing it is the same offense as if the bale of cotton were actually within the walls of the warehouse," is error.

WARNER, C. J. The defendant was indicted for the offense of "larceny from the house," and on the trial thereof the jury, under the charge of the court, found the defendant guilty. A motion was made for a new trial, on the ground of error in the charge of the court to the jury, and because the verdict was contrary to law and the evidence, which motion was overruled and the defendant excepted. The defendant is charged in the indictment with having taken and carried away from the warehouse of the prosecutor one bale of cotton, the said warehouse being a place where valuable goods were stored, with intent to steal the same. The evidence in the record shows that the bale of cotton was not *in* the warehouse, but *outside* of it, in an alley way. The court charged the jury "that if they found from the evidence that the bale of cotton was in front of the warehouse and under its control and protection, it would be the same criminally as if within its walls, and would be a taking from, upon the same basis as if a storekeeper places goods in front of his store, and a thief take them therefrom, it would be larceny from the house." The 4413th section of the Code defines larceny from the house to be the breaking or entering said house, stealing *therefrom* any money, goods, clothes, wares, merchandise, or anything or things of value whatever. The 4414th section defines the penalty for stealing *in* any of the houses described in that section. Simple theft or larceny is the wrongful and fraudulent taking and car-

rying away by any person, of the personal goods of another, with intent to steal the same. Code, 4393. The distinction between simple larceny and larceny from the house will be readily perceived. The evidence in the record before us does not show that the defendant was guilty of the offense of larceny from the house, inasmuch as it does not show that the cotton alleged to have been stolen was *in* any house, or that it was taken by the defendant *therefrom*. The charge of the court, in view of the evidence contained in the record, was error.

Let the judgment of the court below be reversed.

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PRICE vs. STATE.

(41 Tex., 215.)

LARCENY: *Practice*.

Throwing goods off a railway train in motion, with a felonious intent to appropriate them, is larceny.

The court will not consider on appeal an objection not raised on the trial that the name of a corporation was not proven according to the fact.

ROBERTS, C. J. The defendant is charged with the theft of a bale of cotton from a train of the Houston & Texas Central Railroad Company, being the property of said company.

It was proved that defendant, being on the train at night, threw off a bale of cotton privately, he having got on the train to ride a small distance, and upon finding that the brakeman, who saw him do it, was going to report him to the conductor, he jumped from the train to escape arrest, and could not afterwards be found on the train.

It is objected in defense, that the act of throwing off the bale of cotton under the circumstances was not such a taking into possession of the bale of cotton as amounted to a complete act of theft. The cotton was removed from the position on the train where it was placed by the owners, and removed from their possession by being thrown off of the train by him. The fact and circumstances connected with the act justified the jury in concluding that it was done to convert the cotton to his own use.

It is objected also that the proper name of the company is the Houston & Texas Central Railway Company, and not the

Houston & Texas Central Railroad Company, as it was alleged and proved on the trial. To this it may be answered that it was a matter of fact not raised on the trial, and only to be ascertained by reference to the private act of the legislature constituting the charter of the company. It was not necessary to set out the charter in the indictment, or to allege it to be a chartered company otherwise than by name, as was done in this case. Arch. Pl. & Pr., note, 271; *People v. Curling*, 1 Johns., 320.

The proof corresponds with the indictment as to the name of the company, and there was no question made in relation to it on the trial in any way.

The proof of *alibi*, attempted as a defense, being wholly dependent on the particular date, which was not fixed with certainty, is not of a character to reverse the finding of the jury.

Finding no material error in the charge of the court, and there being evidence sufficient to sustain the verdict, the judgment will be affirmed.

*Judgment affirmed.*

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FLYNN *vs.* STATE.

(42 Tex., 301.)

LARCENY: *Asportation.*

On a trial for larceny from the person, it appeared that respondent put his hand into the prosecutor's pocket and took his pocketbook in his hand, drew it half way out of the pocket, when, being discovered, he let it go and ran off. *Held*, a sufficient asportation, and that respondent was guilty of larceny.

DEVINE, J. The appellant, with James Anderson and George Wheeler, was jointly indicted for theft from the person of Nicholas Walsh. The charge was dismissed as to Anderson, the defendant Flynn alone being tried. The jury found him guilty, and assessed his punishment at five years in the penitentiary.

The errors assigned are, that the charge of the court was contrary to law, and that it misled the jury; that the court erred in refusing the charge asked by defendant; that the verdict of the jury was not warranted by the evidence, and that the court erred in overruling the motion for a new trial.

The charge of the court was clear, concise, and embraced the

law applicable to the case; it directed the mind of the jury to the law, which had reference only to the facts in evidence; it was quite as favorable to the accused as the evidence demanded, or the law permitted. We find no error in the charge. The refusal of the court to give the instructions asked for defendant was, under the facts of the case and the law, a proper exercise of discretion. The evidence, uncontradicted, shows that while appellant's codefendant and associate (Wheeler) was "jostling against him (Walsh), and impeding his exit from the crowd at the theater, appellant forced his hand into Walsh's pocket, took the pocket book into his hand, and drew it half way out of the pocket, when the owner, feeling the movement, turned suddenly around, and, with an angry exclamation, disconcerted the accused, who then made his escape; the witness stating further that he resisted defendant's going away with the book, as [well] as he could, on finding him withdraw it. The accused was indicted under article 762 of the Criminal Code. Article 763 defines the necessary requisites to constitute the offense:

1st. A theft from the person.

2d. The commission of the theft without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away; and,

3d. "It is only necessary that the property stolen should have gone into the possession of the thief; it need not be carried away in order to complete the offense." In the present case it was taken from the person, from the place where the owner had deposited it.

4th. While Walsh was annoyed and his attention attracted by Wheeler, the defendant (in the language of the code) "privately" took into his possession the pocketbook, and without the knowledge of the owner.

5th. The evidence shows he had, or held it in his hand, had removed it half out of the pocket—a sufficient possession, within the letter and spirit of the code, of property so small and portable as the article taken. The provision in article 763, which dispenses with the necessity of proving the carrying away of property stolen from the person, and which makes the mere going into the possession of the thief, of such property, sufficient proof, justified the court in refusing the instruction asked.



The object of the framers of the code, in prescribing the same punishment for theft from the person and theft from a house, was evidently to give to the property or the person the same degree of protection as is given to property in a house; in the last case it is not necessary to show a removal of the property charged to have been taken from the house; the reason of the rule is quite as strong when applied to property on the person, and the code has removed doubt on this subject by declaring the offense complete when the property charged to have been stolen is taken into the possession of the person charged with the theft. That the offense is complete when the property is taken into possession was so held in a case decided during the late session at Tyler, where a party attempted to steal money during the night from the clothing of a companion with whom he was traveling.

The evidence sustains the verdict, and there was no error in overruling the motion for a new trial.

*Affirmed.*

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KING vs. STATE.

(54 Ga., 184.)

SIMPLE LARCENY: *Larceny from the person.*

Simple larceny and larceny from the person are distinct offenses, and where simple larceny is a greater crime than larceny from the person (as it is on the facts of this case), the respondent cannot be convicted of a simple larceny on evidence which establishes a larceny from the person.

WARNER, C. J. The defendant was indicted for the offense of "simple larceny" under the 4406th section of the code, and charged with having wrongfully, fraudulently and privately, taken and carried away, with intent to steal the same, certain described United States national currency notes, of the value of twelve dollars. The evidence upon the trial proved a technical "larceny from the person." The jury, under the charge of the court, found the defendant guilty.

A motion was made for a new trial, on the ground that the court erred in charging the jury that they could find the defendant guilty of simple larceny, as defined by the 4406th section of the code, notwithstanding the evidence showed that it was a technical larceny from *the person*. The court overruled the motion, and the defendant excepted.

By the 4406th section of the code, it is declared that if any person shall take and carry away any bond, note, bank bill or due bill, or paper or papers, securing the payment of money, etc., with intent to steal the same, such person shall be guilty of simple larceny. By the 4410th section, theft or larceny from the person is defined to be the wrongful and fraudulent taking of money, goods, chattels or effects, or any article of value from the person of another privately, without his knowledge, in any place whatever, with intent to steal the same.

"Simple larceny," and "larceny from the person" are two distinct offenses under the code. It is true, that if any person shall take and carry away any bond, note, bank bill, etc., with intent to steal the same, such person is guilty of simple larceny; and it is also true, that if any person shall wrongfully and fraudulently take and carry away the personal goods of another, other than bonds, notes, bank bills, etc., with intent to steal the same, he would be guilty of simple larceny, but it does not follow that if bonds, notes, bank bills, etc., are taken from *the person* of another privately and without his knowledge, that the party defendant so taking the same may be indicted and punished for the offense of simple larceny. If one should take and carry away a box of jewelry, with intent to steal the same, he would be guilty of simple larceny, but if one should take a box of jewelry from *the person* of another, privately, without his knowledge, with intent to steal the same, he would be guilty of larceny from the person. So in this case, if the defendant had not taken the currency bills from *the person* of another privately, and without his knowledge, he might have been indicted and punished for the offense of simple larceny, but as the evidence shows that he was guilty of larceny from *the person*, he should have been indicted and punished for that offense.

Simple larceny and larceny from the person, as before remarked, are two distinct offenses, and the punishment is different. Simple larceny of currency notes, under the 4406th section of the code, is punished as a felony by imprisonment in the penitentiary for not less than one year nor longer than four years, whereas, strange as it may appear, larceny from *the person* of currency notes is only punishable as a misdemeanor under the provisions of the act of 1866, reducing certain crimes below felonies. The result, therefore, is, in relation to the case now

before us, that the defendant has been indicted and found guilty of a felony, for which he may be punished by imprisonment in the penitentiary for not less than one year nor longer than four years, when if he had been indicted for larceny from *the person*, the offense of which it is admitted the evidence proved him to have been guilty, he could only have been punished, as the law now stands, as for a misdemeanor. It might be a *convenient way* to indict the defendant for simple larceny and punish him as for a *felony* under the 4406th section of the code, when the evidence proved he was guilty of larceny from the person, and could only be punished therefor as for a misdemeanor. The simple objection to this course of proceeding is, that the penal laws of the state do not authorize it. There are four distinct classes of larceny recognized by the penal code of this state: 1st. Simple larceny; 2d. Larceny from the person; 3d. Larceny from the house; 4th. Larceny after a trust or confidence has been delegated or reposed. Code, § 4392.

If any person shall steal currency notes, or other *choses* in action, or any article of value from the person of another, privately, without his knowledge, in any place whatever, such person is guilty of the offense of larceny from *the person*, and should be indicted therefor and punished as prescribed by law for *that offense*. If any person shall steal and carry away any currency notes, or other valuable thing as described in section 4406, *otherwise than from the person of another*, such person is guilty of simple larceny, and should be indicted therefor, and punished as prescribed by law for that offense. Penal laws are to be construed *strictly*, therefore the defendant in this case could not legally have been convicted and punished for the offense of simple larceny, under the 4406th section of the code, which is a felony, when the evidence clearly proved that he was only guilty of the offense of larceny from the person, which is not a felony, but a misdemeanor. The offense of a misdemeanor under the law cannot be converted into a *felony* and punished as such, in *that way*, without a violation of the fundamental principles of the penal laws of the state. In our judgment the court erred in overruling the defendant's motion for a new trial.

Let the judgment of the court below be reversed.

## STATE vs. GRAVES.

(72 N. C., 482.)

BURGLARY AND LARCENY: *Effect of possession of stolen property.*

On a trial for burglary and larceny, where evidence was given that the respondent was found in possession of the watch and chain stolen, within forty hours after the burglary, it is error to charge that if the jury believes this fact, the law presumes that he is the thief and that he has stolen the watch and chain, and he is bound to explain satisfactorily how he came by the goods.

The rule in North Carolina as to the effect of the possession of stolen property is this: "When goods are stolen, one found in possession so soon thereafter that he could not reasonably have got the possession unless he had stolen them himself, the law presumes he was the thief."

INDICTMENT for burglary, tried before KERR, J., at December term, 1874, *Guilford* Superior Court.

The burglary alleged was the breaking into and entering the house of J. I. Scales, in the city of Greensboro, N. C., on the night of the 8th of August, with the intent to steal, and stealing and carrying away a watch and chain, the property of J. I. Scales.

There was evidence tending to prove that between nine o'clock on that night and two o'clock A. M. of the 9th of August, Mr. Scales' house was entered by some one forcing open the blinds and raising the window sash of a room called the nursery; that between that room and the bed-chamber was the dining-room; that a lamp was left burning in the dining-room, from which a light shone into both the nursery and bed-chamber. That Scales went to bed about nine o'clock, and hung his coat and vest on the back of a chair in his bed-room, the watch being in the vest pocket, and attached thereto by the chain.

That Jennie Stevens, a colored servant girl, was in the house when Scales went to bed, at what time she left the house was not shown, further than that she left during the night and went to her usual place of sleeping.

It was further in evidence that the prisoner was in Danville, in the state of Virginia, on the 10th of August, and had the watch and chain in his possession, and swapped them off for another watch and chain, getting boot.

It was in evidence that the prisoner was in Rockingham county on the 6th of August, at the election, and also on the night of the 6th, and that he said on that night that he was going

to Greensboro the next day, and did leave the house at which he was stopping the next day.

There was no evidence that he was in Greensboro on the night in which the alleged burglary was committed.

The prisoner was arrested about the 4th of September, in Rockingham, and brought to Greensboro jail. When arrested, the prisoner denied the charge.

When in prison, the prisoner told Scales that he got the watch and chain from John and Dennis Sellars on Sunday night, the 9th of August, and that they told him to take them to Danville and trade them off. The prisoner at first told Scales that he did not know the watch, but in a few minutes afterwards, admitted that he did know the watch as soon as he saw it; that he had seen Scales wear it a hundred times.

It was proven that the prisoner, preceding and up to July, had been a servant of Scales, and often in his house and the rooms thereof. That on the first or second day after the watch was stolen, Scales had Jennie Stevens, his servant, and one Jim Edwell, arrested on the charge of committing the crime. That on the night of the alleged burglary, Jim Edwell was seen about dark dodging behind a tree at the corner of the house, near the window alleged to have been broken open. That he was halted by a servant man twice before he did so, near the front gate of the residence of Scales. That some hour or two afterwards, this servant and Jennie Stevens went out of the front gate and saw Edwell alone again passing; that he walked before them a half mile, and Jennie Stevens had a conversation with him which the witness did not hear. That Jennie Stevens had a small bundle which she gave to witness to hold while she talked with Edwell. That about an hour afterwards, witness saw Edwell in about one hundred yards of Scales' house talking to a colored man.

It was also in evidence that when the prisoner had the watch in his possession and was offering to exchange it for another, he said that he had bought it of a broker for \$40, and in a few minutes he told another person that he gave \$48 for it, and said that he made a mistake when he said he gave \$40. It was also shown that when the prisoner was arrested, he was concealed under a bed, and had tried to escape up a chimney.

His honor, among other things, charged the jury that if they

believed from the evidence that the prisoner was in possession of the watch and chain in Danville, Virginia, on the Monday after the watch was stolen on Saturday night, the law presumed that he was the thief, and that he was bound to explain satisfactorily how he came by it.

The prisoner excepted. The prisoner's counsel asked his honor to charge "that if there was any reasonable hypothesis arising out of or suggested by the evidence by which, taking all the facts proven to be true and he not guilty, that the jury should acquit the prisoner." His honor charged the jury that in giving to the prisoner the benefit of the reasonable doubt, they should not be controlled by mere conjecture that some one else did the deed; that they must be fully satisfied that the prisoner did the deed." Prisoner excepted. There was a verdict of guilty, rule discharged, judgment of death pronounced, and the prisoner appealed.

*Scott & Caldwell*, for the defendant. Attorney General *Hargrave*, for the state.

PEARSON, C. J. The fact that the "watch and chain" were found in the possession of the prisoner at Danville, on the Monday after the burglary on the Saturday night preceding, at Greensboro, connected with the fact that he was offering to dispose of the articles at much less than their value, and made contradictory statements as to how he got them, were matters tending to show either that the prisoner was the man who broke and entered the dwelling house and stole the watch and chain, or else that he had received the goods, knowing them to have been stolen. These facts, taken in connection with the evidence of the mysterious movements of Jim Edwell and Jennie Stevens, about the premises on the night of the burglary, were fit subjects for the consideration of the jury.

His honor committed manifest error in taking the case from the jury and ruling that "if the jury believed from the evidence that the prisoner was in possession of the watch and chain in Danville on the Monday after the watch and chain were stolen on Saturday night in Greensboro, *the law presumed he was the thief*, and had stolen the watch and chain, and that the prisoner was bound to explain satisfactorily how he came by the goods." The rule is this: "Where goods are stolen, one found in possession so soon thereafter, that he could *not have reasonably got the pos-*

*session unless he had stolen them himself, the law presumes he was the thief."*

This is simply a deduction of common sense, and when the fact is so plain that there can be no mistake about it, our courts, following the practice in England, where the judge is allowed to express his opinion as to the weight of the evidence, have adopted it as a rule of law, which the judge is at liberty to act on, notwithstanding the statute, which forbids a judge from intimating an opinion as to the weight of the evidence. But this rule, like that of *fulsum in uno, fulsum in omnibus*, and the presumption of fraud, as a *matter of law*, from certain fiduciary relations (see *Pearce v. Lea*, 68 N. O., 90), has been reduced to very narrow proportions, and is never applicable when it is necessary to resort to other evidence to support the conclusion; in other words, the fact of guilt must be *self-evident* from the *bare fact* of being found in the possession of the stolen goods, in order to justify the judge in laying it down, as a presumption made by the law, otherwise it is a case depending on circumstantial evidence, to be passed on by the jury.

In our case, so far from the fact of guilt, to wit: that the prisoner broke and entered the house and stole the watch and chain, being self-evident, it is a matter which, under the circumstances proved, admits of grave doubt, for it may well be that the prisoner merely received the watch and chain after some one else had committed the burglary, which would lower the grade of the crime very materially. As the case goes back for another trial, it is a matter for the solicitor of the state to consider whether it will not be well to send a new bill containing other counts to meet the different aspects of the case, as it may be looked upon by the jury.

Error.

PER CURIAM:

*Venire de novo.*

STATE vs. WALKER.

(41 Iowa, 217.)

BURGLARY AND LARCENY: *Effect of recent possession.*

A charge which instructs the jury that proof of possession of part of the stolen goods, four months after the commission of the crime, no reasonable explan-



ation being given of the possession, should be regarded as raising a strong presumption of guilt, is erroneous.

The rule is, that *recent* possession of stolen property, unaccounted for, is a strong presumption or *prima facie* evidence of guilt.

What is recent possession is a question of fact, to be submitted to the jury, except in those cases where the court, in favor of the prisoner, can say, as a matter of law, that possession is not recent.

MILLER, C. J. The court, among other instructions to the jury, charged as follows:

"If you find that the store of the witnesses, S. E. & John Johnson, was burglariously entered, about the night of the 3d of February, 1873, and a large quantity and variety of goods stolen therefrom, and that the following June different portions and varieties of the same goods were found in the premises of the accused, and you further find that the defendant has been unable to give any reasonable explanation of how he came by such possession, then such facts should be regarded by the jury as raising a strong presumption that the defendant was himself guilty of feloniously taking the property."

This instruction is erroneous. The rule is well settled that the *recent* possession of stolen property, unaccounted for, is a strong presumption, or *prima facie* evidence, of guilt. *Warren v. The State*, 1 G. Greene, 106; *The State v. Taylor*, 25 Iowa, 273; *The State v. Brady*, 27 id., 126; *Jones v. The People*, 12 Ill., 259; *Commonwealth v. Millard*, 1 Mass., 6; 3 Greenl. Ev., §§ 31, 32 and 33.

What is to be termed *recent* possession depends very much upon the character of the goods stolen. If they are such as pass readily from hand to hand, the possession, in order to raise a presumption of guilt, should be much more recent than if they were of a class of property that circulated more slowly, or is rarely transmitted.

There may be cases where the possession is so long after the commission of the crime that a court will refuse to submit the question to the jury — deciding, as a matter of law, that the possession is not recent — but in all other cases the question is one of fact, to be submitted to the jury. See *Rex v. Partridge*, 7 Car. & P., 551; *The State v. Bennett*, 3 Brev., 514; *The State v. Jones*, 3 Dev. & Bat., 122; *Rex v. Adams*, 3 Car. & P., 600; *Regina v. Cruttenden*, 6 Jur., 267; *Commonwealth v. Mont-*

gomery, 11 Metc., 534; *Engleman v. The State*, 2 Ind., 91; *Price v. The State*, 846.

The instruction was erroneous, in that it directed the jury that, as a matter of law, proof of possession of part of the stolen goods four months after the commission of the crime was recent possession, from which a strong presumption of guilt arose, unless the possession was satisfactorily explained. The judgment must, therefore, be reversed, and a new trial ordered.

*Reversed.*

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YATES vs. STATE.

(37 Tex., 202.)

LARCENY: *Effect of recent possession.*

Possession of a stolen feather bed and some bed clothing, five months after they were stolen, is not such recent possession as of itself to raise a legal presumption that the party in possession is the thief. It is merely a circumstance to be submitted to the jury in connection with other evidence.

OGDEN, J. The first clause of the charge of the court in this case is in these words: "Property recently stolen being found in the possession of a person, the law presumes that person to be the thief, and such person must rebut the presumption by proof, such as having bought the property in a public manner." We think there is error in this charge, especially when applied to the facts as proven on the trial of this case.

Easter Waggoner, on the last day of December or first day of January, had taken from her house, by some person unknown to her, a feather bed and some bed clothing, and on the first of June following the deputy sheriff found the missing articles in appellant's house. Five months had elapsed since the property had been missed from the house of the owner, before it was found in the possession of the appellant, and it may have changed hands several times during that period; and we cannot subscribe to the doctrine laid down by the court, that the possession of this property, admitting it to have been stolen, was so recent after the theft as to raise the legal presumption that the party in possession is the thief. It was a circumstance which might very properly have been submitted to the jury, in connection with other evidence of guilt; but we do not think this evidence

of possession, alone, sufficient to warrant a conviction, and yet the charge of the court would appear to give it that degree of importance.

Possession of stolen property, however remote from the date of the theft, may be said to raise a presumption of a guilty possession; but that presumption must necessarily greatly diminish as time elapses, until it becomes so slight as to hardly make an impression upon a reflecting mind.

Mr. Bishop, after reviewing many decisions on this question, seems to come to the conclusion that the simple possession of stolen goods, however recent after the theft, does not raise a sufficiently strong presumption of guilt to warrant a conviction for that crime. But he says there are nearly always other circumstances and evidence attending that possession, such as the character of the party, the explanation given or refused, or attempts at concealment, which may greatly increase or diminish the presumption raised by the possession.

We think the charge of the court gave too much importance to the simple fact of the possession of stolen goods five months after the same had been stolen, and that, in doing so, it was calculated to mislead the jury. The latter part of this clause of the charge is still more objectionable than the former. The jury are told that the law presumes the possessor of stolen property, recently after the theft, to be the thief; and he must rebut that presumption by proof, such as having purchased the property in a public manner. We can hardly comprehend the force of this portion of the charge, nor can we understand why a purchase made privately, if innocently made in good faith, would not protect the possessor as fully as though the purchase had been made publicly.

There is much conflict in the testimony in this case, and therefore it becomes highly important that the jury should have the law plainly and correctly given them, as a guide for their verdict.

The judgment of the district court is therefore reversed, and the cause remanded.

*Reversed and remanded.*

## PEOPLE vs. NOREGA.

(48 Cal., 123.)

LARCENY: *Effect of recent possession.*

On a trial for larceny, the only evidence was, that respondent was found in possession of the stolen horse a few hours after it was stolen. *Held*, that the evidence was not sufficient to justify a conviction.

On a trial for larceny, evidence of the recent possession of stolen property is not of itself sufficient to justify a conviction.

WALLACE and MCKINSTRY, JJ., not expressing an opinion.

RHODES, J. The defendant was convicted of grand larceny, for the stealing of a horse. The only evidence of defendant's guilt was, that the stolen horse was found in his possession a few hours after it was taken. *People v. Chambers*, 18 Cal., 382; and *People v. Ah Ki*, 20 id., 178, hold that the possession of stolen property is a circumstance to be considered by the jury, but it is not, of itself, sufficient to warrant a conviction. It is said by Greenleaf (3 Greenl. Ev., sec. 31): "It will be necessary for the prosecution to add the proof of other circumstances indicative of guilt, in order to render the naked possession of a thing available towards a conviction."

The evidence discloses no circumstances of that character. The riding of the horse several miles beyond the point where he was first seen in possession of it is only his continued possession of it, and is not a further circumstance indicative of guilt. The leaving of the saddle with the innkeeper does not tend to prove a larceny of the horse.

There may be an abundance of authority to sustain the point of the attorney general, that the court erred in excluding evidence as to the defendant's confession, after the preliminary evidence as to its having been voluntary; but the point does not arise in the defendant's appeal.

Judgment reversed, and cause remanded for a new trial.

*Remittitur forthwith.*

Neither Mr. Chief Justice WALLACE nor Mr. Justice MCKINSTRY expressed an opinion.

## GALLOWAY vs. STATE.

(41 Tex., 289.)

LARCENY: *Evidence.*

Possession of a stolen pipe within a week or ten days after it was stolen, in connection with the other circumstances in this case, was held insufficient to warrant a verdict of guilty.

THE defendant was convicted at May term, 1873, for theft from a house of a pipe of the value of two dollars; the punishment fixed at two years in the penitentiary.

The prosecution proved by A. D. Stroud, that within twelve months next before the indictment, he lost his pipe; had laid it on the counter in his storehouse in Rusk county; that about half an hour afterwards, he looked for the pipe, but could not find it; spoke of losing it to several persons at the time; several persons were in the store trading, passing in and out of the house. Witness did not see the defendant in or about the store on the day the pipe was stolen or lost; the pipe was taken without his knowledge or consent; was worth two dollars; he never saw it afterwards until it was brought to him by J. A. Poe, a week or ten days after the time he lost the pipe, when Poe brought it to witness.

Poe testified that defendant came into witness' family grocery a few days (less than a week) after he had heard Stroud had lost his pipe; that defendant was smoking a pipe he thought was Stroud's; witness offered to buy it; defendant said he would sell it; witness gave him a dollar's worth of cigars for it; defendant was smoking the pipe openly in the town of Henderson, walking up and down the streets; that Stroud, who had lost the pipe, was then doing business in the town of Henderson; defendant told witness first he "had found the pipe," but after talking awhile said he had bought it of a negro, whose name he did not know; defendant at the time was drunk; witness went to Stroud and gave him the pipe, and told him of whom he got it on the same day he got it from defendant.

No counsel for appellant.

*Brown*, for the state.

MOORE, A. J. The place and manner of the alleged theft; the character and value of the missing property supposed to be sto-

len; the facility with which it may have passed from one person to another without occasioning sufficient observation to enable appellant to prove or even remember the name of the person from whom he may have gotten it; the slight value attached to it; the open manner in which he used and exhibited it in the immediate vicinity of the place where it was said to be stolen; the length of time which had elapsed after the pipe was missing until it was found in his possession, with his statement when asked how and where he got it, that he bought it from a negro, whose name he did not now remember, if not sufficient to rebut all presumption of guilt arising from the bare proof of possession of the stolen property, warrants at least such a well founded doubt of appellant's guilt, that the court below should have granted a new trial.

The judgment is reversed and the case remanded.

*Reversed and remanded.*

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REGINA vs. STARR.

(40 U. C. Q. B. Rep. 268.)

LARCENY — *Recent possession — Evidence.*

On indictment for stealing cooper's tools on the 5th of November, 1874, it appeared that the prisoner was not arrested for nearly two years afterwards. During that time — it was not known precisely when — he was proved to have sold several of the tools at much less than their value, representing that he was a cooper by trade, and was going to quit it, which was proved to be untrue. It was proved also that he was in the shop from which the tools were stolen the night before they were taken, and frequently; and that when arrested, he offered the prosecutor \$35 to settle and buy new tools, and offered the constable \$100 if he could get clear. *Held*, that though the mere fact of the possession by the prisoner, after such a lapse of time, might not alone suffice, yet that all the facts taken together were enough to support a conviction for larceny.

CASE reserved from the County Judge, Criminal Court, of Huron, by ISAAC TOMS, Co. J.

The facts were as follows: The indictment was for larceny and receiving. The conviction was for larceny.

There were in fact two questions for determination:

1. Whether the admissions or offers of the prisoner to settle were admissible.

2. Whether, if admissible, there was on the whole case evidence to go to a jury, if there were one, in support of a charge of larceny.

The things stolen were cooper's tools. They consisted of two adzes, champer knife, a leveler, hand axe, and other similar articles. They were stolen either on the night of the 5th November or morning of the 6th November, 1874, out of a cooper's shop in Seaforth. The shop was usually locked at night. During the night of 5th November, 1874, it was broken into. A pane of glass had been taken out of the back window, which allowed a person to withdraw the bolt and enter the shop. The prisoner before and at the time of the larceny was at Seaforth. He was in the shop the night before the taking of the tools, and had used one of them. He was frequently in the shop, and the evidence did not point to any other than the prisoner as the thief. The prisoner was not arrested for the stealing till nearly two years afterwards. During that time he was proved, from time to time, to have sold several of the tools at prices much below their value. He represented that he was a cooper by trade; that he had been working at the cooperage trade for some time and was going to quit it. This statement was proved devoid of truth. After his arrest he stated that he had purchased the tools from a party in Brussels; that he purchased them in the presence of a woman now dead; and that the purchase was made in a particular tavern named. His brother proved the purchase of a tool or tools by the prisoner of a man under the influence of drink in a tavern at Brussels, but there was no satisfactory evidence to show that the purchase was of any of the tools in question. This was in January or February last. The man from whom the tools were purchased was described by a brother of the tavern keeper as "a hard looking case."

The prisoner after his arrest offered the prosecutor \$35 to settle, and to purchase a new kit of tools. He told another witness he would give \$100 if he could get clear of the tools. He was arrested on the 21st of September last. On that day he said to the prosecutor, in the presence of the constable who made the arrest, that he had purchased the tools in a tavern at Brussels. The constable proved the offer to him of \$100 by the prisoner, when the latter was being taken to the lockup. There was no evidence of any inducement offered to the prisoner, either by the



prosecutor or by the constable. But the prosecutor told the constable he was willing to let the prisoner go, if the constable would.

December 6, 1876, *J. K. Kerr*, Q. C., appeared for the crown. He referred to Archb. Cr. Pl., 18th ed., 251; Rose. Cr. Ev., 8th ed., 50; *Rex v. Adams*, 3 C. & P., 600; *Rex v. Partridge*, 7 id., 551.

He stated that the prisoner desired to cite *Rex v. Crowhurst*, 1 C. & K., 370; *Regina v. Wilson*, 7 Cox, 310; *Regina v. Wilson*, 26 L. T. M. C. 45; *Regina v. Taylor*, 8 C. & P., 733.

December 29, 1876. HARRISON, C. J. There is no ground for excluding the offers made to the prosecutor or the constable. It does not appear that there was any inducement whatever held out by either of them. It would be a waste of time to refer to the authorities on the point: Archb. Crim. Pl., 18th ed., 389.

But the important question is, whether, assuming this evidence to have been rightly received, there was evidence against the prisoner of larceny.

We regret he was not represented by counsel at the argument before us. But the argument, if any, on his behalf would be:

1. That there is nothing against him but the fact of the possession of the things stolen.
2. That the possession was not a recent one.
3. That he gave a satisfactory account as to his possession.
4. That even if a recent possession, and no satisfactory account given, such possession is not evidence of larceny but of receiving.

Recent possession of stolen property is evidence either that the person in possession stole the property, or that he received it, knowing it to have been stolen, according to the other circumstance of the case. *Regina v. Densley*, 6 C. & P., 399; *Regina v. Smith*, 1 Dears., 494; *Regina v. Byrne*, L. R., 4 Ir. C. L., 68; *Regina v. McMahon*, 13 Cox, 275.

If no other person be involved in the transaction forming the subject of inquiry, and the whole of the case against the prisoner is, that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than receiving; but in every case, except indeed where the possession is so recent that it is impossible for any one else to have com-

mitted the theft, it becomes a mere question for the jury, whether the person found in possession of the stolen property stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence which is consistent either with his having stolen the property or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution. *Regina v. Longmead*, 1 Leigh & C., 427, 437, 439, 441.

The rule is, that if stolen property be found recently after its loss in the possession of a person, he must give an account of the manner in which he became possessed of it—otherwise the presumption attaches that he is the thief. Per BAYLEY, J., in *Rex v. —*, 2 C. & P., 459.

If the person into whose possession the stolen property is traced, gives a reasonable account how he came by it, as by telling the name of the person from whom he received it, it is incumbent on the prosecutor to show that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its truth lies on him. Per ALDERSON, B., in *Regina v. Crowhurst*, 1 C. & K., 370.

"Suppose, for instance, a person were to charge me with stealing a watch, and I were to say, I bought it from a particular tradesman, whom I name; that is *prima facie* a reasonable account; and I ought not to be convicted of felony, unless it is shown that account is a false one." Id.

The decision of ALDERSON, B., in *Regina v. Crowhurst*, 1 C. & K., 370, was followed by Lord DENMAN, in *Regina v. Smith*, 2 id., 207.

But it is not to be understood from either of these cases that it is incumbent on the Crown, relying solely on a recent possession of goods, in every case to call as witnesses the persons to whom the prisoner referred, to account for his possession. *Regina v. Wilson*, 7 Cox, 310.

If in this case there could be said to be recent possession, we could not hold the prisoner's account of how he became possessed of the property satisfactory, and it does not appear to be much, if any, improved by the testimony of the witnesses called on his behalf to substantiate the account.

The question of what is or is not to be held a recent posses-

sion is to be considered with reference to the nature of the articles stolen. *Ree v. Partridge*, 7 C. & P., 551.

Where two ends of woolen cloth, in an unfinished state, consisting of about twenty yards each, were lost, and were in the possession of the prisoner two months after being stolen, and still in the same state, it was held that this was a possession sufficiently recent to call on the prisoner to show how he came by the property. *Id.*

If the only evidence against the prisoner be, that the stolen property was found in his possession three months after the loss of it, the judge may direct an acquittal. *Ree v. Adams*, 3 C. & P., 600. And if it appear that so long a period as sixteen months has elapsed, it would not be reasonable to apply the presumption either of stealing or receiving, to the prisoner. *Ree v. —*, 2 C. & P., 459.

But if there be evidence of something more than the mere fact of the property being in possession of the prisoner for a time which cannot be held to be recent, the case ought not necessarily to be withdrawn from the consideration of the jury. *Ree v. Adams*, 3 C. & P. 600.

In this case there was not only the fact of possession (not shown precisely when as to the different articles), but the fact that the prisoner was in the shop the night before the articles were stolen; the fact when selling them he represented himself as a cooper going out of business, which was untrue; the fact that the articles were sold by him greatly below their value, and the fact of his offers to the prosecutor and the constable with a view to the prevention of the prosecution.

While any one of these facts, standing by itself, might not be strong enough to raise a reasonable presumption of guilt, the consideration of all of them, in our opinion, could have no other effect.

All the questions submitted for our opinion in the case stated by the learned judge of Huron, must be answered against the prisoner.

The case is defective in omitting to state whether or not the prisoner has been sentenced. If not sentenced, we order the learned judge to pass judgment on the prisoner.

MORRISON, and WILSON, JJ., concurred.

*Conviction affirmed.*

## STATE vs. COLLINS.

(72 N. C., 144.)

## LARCENY: Evidence.

In a prosecution for larceny, the evidence must precisely identify the thing stolen. It is not sufficient to show that one of two things equally valuable was stolen.

READE, J. The defendant is charged in one count with stealing "one national bank note, of the denomination of five dollars, one treasury note of the denomination of five dollars." It is uncertain whether the charge should be construed to be, that he stole *both* a treasury note and a bank note, or that he stole one or the other, and *only* one. It would have been proper to charge in one count, the stealing of a bank note and a treasury note, or to charge the bank note in one count, and the treasury note in another count. We suppose from what appeared in evidence, that the indictment was put in this rather dubious form, to meet anticipated dubious evidence. But this cannot avail, because both the evidence and the indictment ought to be specific and certain. We have to take the indictment as charging the stealing of both a bank note and a treasury note, and that is sufficient. But still in order to convict, it was necessary to prove, not the stealing of one or the other, not knowing which, but specifically which one.

And the witnesses said, "that they did not know whether the bill was one issued by the treasury department, or by some one of the national banks; but it was a bill in usual circulation. No evidence as to but one bill being stolen." The jury returned a verdict of "guilty." But guilty of what? They could not know more than the witnesses knew, and the witnesses did not know what? This is not like the case of *State v. Williams*, 9 Ired., 140, where the defendant was indicted under the statute for stealing a slave, in several counts; one that the taking and carrying away was by "violence," and another that it was by seduction, and others varying the *manner* of doing the thing. There it was held sufficient if the jury found that he did it in either way. But this is like the case of *Regina v. Bond*, 1 Bennett & Heard's Lead. Crim. Cases, 553, where the defendant was indicted for stealing *coin*, but of what particular denomina-

tion, the witness did not know. And so the indictment charges him with stealing every denomination of coin used in England. The case went up to queen's bench and was much discussed, and all the judges, but one, concurred that the defendant could not be convicted. In that case it was said that the difficulty had arisen in cases of embezzlement, and a statute had been passed to remedy it; but the statute did not embrace larceny. It was probably in consequence of that decision, that a statute was passed, 14 and 15 Vic., ch. 100, sec. 18. "In every indictment in which it shall be necessary to make any averment as to any money, or any note of the Bank of England, or of any other bank, it shall be sufficient to describe such money or bank note, simply as money, without specifying any particular coin or bank note, and such allegation, as far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved." If we had a like statute here, it may be that it would facilitate the conviction of offenders. There is error.

Per CURIAM:

*Venire de novo.*

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STATE vs. CARTER.

(72 N. C., 99.)

LARCENY: *Evidence.*

On a trial for larceny of money, evidence that the prisoner, after the larceny, had money, in no way identified as part of that stolen, is immaterial. Testimony which raises a mere conjecture ought not to be left to a jury as evidence of a fact which a party is required to prove.

BYNUM, J. The count in the indictment against the prisoner relied upon by the state is that which charges him as the receiver of stolen property, knowing it to have been stolen, to wit: A specified number of United States notes of five dollars each, of one dollar each and of fifty cents each. In support of the charge, among other things, the state offered to prove by one William Bailey that "a short time after the larceny the prisoner came to his store and purchased several articles, and he saw several bills of money in his pocketbook when the prisoner went to to pay him, but did not notice the denomination of them." This

testimony was objected to by the prisoner, but admitted by the court. Was this error?

The rule of evidence, as to its admissibility, is, that "testimony which raises a mere conjecture ought not to be left to a jury, as evidence of a fact which a party is required to prove. *Mathews v. Mathews*, 3 Jones, 132; *Cobb v. Fogleman*, 1 Ired., 440; *State v. Allen*, 3 Jones, 257. The state here was required to prove that the prisoner received the stolen "treasury notes" described in the indictment. The evidence admitted to establish this fact was, that the prisoner was seen in a store, a short time after the larceny, whether a day, or a week, or a month after, is not stated; that he purchased several articles and had some "bills of money," neither the amount nor denomination of which was seen. Was the sum of money seen with the prisoner unusual in amount? Was any of it of the denomination of that which was stolen? Was there any incident connected with the store transaction calculated to raise even a suspicion against him?

A man is seen in a store, having some money and making some, we are to assume, ordinary purchases, in the usual course of business. The circumstance of his having some money was one common to all persons who use a circulating medium, and was unaccompanied by a single mark or incident which distinguished his possession, from that of others, of a similar sum of money.

If the prisoner had been indicted for stealing wearing apparel, it would have been just as competent for the state to prove that a short time after the larceny the prisoner was seen dressed in a suit of clothes. The evidence admitted not only does not tend to establish the fact to be proved, but does not afford a rational ground of conjecture of his guilt. What effect this testimony had upon the jury, if any, we have no means of knowing. But as it may have misled them to the prejudice of the prisoner, and was improperly admitted, there must be a *venire de novo*. It is unnecessary to, and we do not decide the other exceptions; but Starkie on Evidence, 335, and *Pollok v. Pollok*, 68 N. C., 46, seem to hold that where the contents of a writing come collaterally in question only, and are not material to the issue, such writing need not be produced, but parol evidence of its contents may be given.

PER CURIAM:

*Venire de novo.*

## CARTER vs. STATE.

(53 Ga., 326.)

LARCENY BY BAILEE: *Pleading — Variance.*

An indictment for larceny by a bailee must state the bailment accurately, and if it does not, there will be a fatal variance.

Anthony Carter was indicted for the offense of larceny after a trust delegated, in this, that he "was intrusted by one John Mongin with four hundred and eighty melons of the value of ten cents each, the property of the said John Mongin, for the purpose of applying the same to the sole use and behoof of the said John Mongin." And "after having been intrusted as aforesaid, failed to apply the article aforesaid as directed, but wrongfully, feloniously, fraudulently, and without the consent of the owner thereof, appropriated the same to his own use, without paying to the owner thereof the full value or market price thereof."

The evidence for the state disclosed that the melons were delivered by Mongin to the defendant to be sold for him, the proceeds to be paid to Mongin, less what the defendant charged for his services; that the melons were of the value charged, and that the defendant paid but one dollar to Mongin.

The evidence for the defendant is omitted as unnecessary to an understanding of the decision. The jury found a verdict of guilty. The defendant moved for a new trial because the verdict was contrary to the law and the testimony. The motion was overruled and defendant excepted.

TRIPPE, J. The statute makes the fraudulent conversion by a bailee of many kinds of property a criminal act, to wit: money, notes, bonds, cotton, corn, horses, mules, etc. If the indictment charged that the defendant was intrusted with money, or a horse, which he fraudulently converted, it could not be sustained by proof that a bond, or cotton, had been so intrusted and converted. So the same statute, Code, sec. 4424, prescribes that when such things or articles have been intrusted to a person for divers different purposes, to be used by him in various specified ways therein defined, and the bailee shall fraudulently convert them to his own use, or otherwise dispose of them, he shall, on conviction, be punished.



It is as much necessary that the character of the bailment, the purpose for which the thing is intrusted, shall be set forth in the indictment, as it is properly to describe the thing or *article* itself. In both cases the rule is founded on the right of a party to have notice of what it is proposed to convict him. We do not suppose that any indictment under this statute ever failed to define both, to wit: the article deposited, and the nature or object of the bailment. Each of them is set forth in the one under consideration. The bailment therein defined is, that the melons were intrusted by the owner with the defendant, "for the purpose of applying the same to the sole use and benefit of the said owner." The proof was, that they were delivered to the defendant for the purpose of selling the same, and after the defendant was satisfied out of the proceeds of sale for his services, the surplus was to be paid to the owner. When the bailee is charged with a trust to be executed in a special mode, distinctly defined when it is created, and is to be brought to account for an alleged breach thereof, either civilly or criminally, he should be notified in the suit or criminal accusation, of what *trust* it is claimed he has been guilty of violating. We think justice and reason demand this, and that it is but preserving a vital rule that obtains in all pleadings, civil or criminal.

*Judgment reversed.*

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MARMONT vs. STATE.

(48 Ind., 21.)

LIQUOR SELLING: *Sale of liquor by club to members.*

In a prosecution for selling liquor on Sunday, it appeared that defendant was an officer of a club which met on Sundays for literary and social purposes, and which was also a mutual benefit society, and that no persons but members were admitted to their meetings; that lager beer was purchased with the society's moneys, and that on Sundays the members who desired drank the beer, and each time they got a glass, paid five cents into the treasury, and that the defendant had no personal interest in the matter, but merely acted as an officer of the club: *Held*, that this was a sale of liquor by the club to its members, and that defendant was properly convicted, having been the agent who made the sale.

BUSKIRK, C. J. The appellant was indicted, tried and convicted, in the court below, for selling intoxicating liquors on Sunday, and permitting them to be drunk upon the premises.

The court overruled a motion for a new trial, and rendered judgment on the finding.

The appellant has assigned for error the overruling of the motion for a new trial.

It is contended by counsel for appellant, that the finding of the court was not sustained by, but was contrary to the evidence.

The case was tried in the court below, solely and exclusively upon an agreed statement of facts, which was as follows:

"1. At and for a long time previous to the day named in the indictment, the defendant was a member and the treasurer of an association of German citizens of the city of Indianapolis, in the county of Marion, in the state of Indiana, consisting of about forty persons, united together for sociable and relief purposes, and called "The MODOCK CLUB."

"2. Each person becoming a member of said society paid into the treasury the sum of fifty cents, and thereafter a monthly assessment of ten cents, to form the basis of a fund for payment of expenses and reliefs of said society; and the said society was and is regularly organized, and has a president, vice-president, secretary and treasurer.

"3. Said society meets regularly on the first day of the week, commonly called Sunday, and the members pass the time of meeting in hearing speeches, and discussions on divers subjects, moral, political, and historical, reading the newspapers subscribed for by the association, conversing, smoking, taking a glass of lager beer, and drinking same, when they feel disposed thereto.

"4. The meetings of said association are held in Marmont's Hall, a building on the southwest corner of Illinois and Georgia streets, in the city of Indianapolis, in the said county of Marion, in said state of Indiana, and no persons are admitted to said meetings except its members, and each member is furnished with a pass-key by which he can enter the hall on the days of meeting.

"5. On Saturday of each week, the treasurer of said association (who is the defendant in this indictment), by its order, purchases a keg of Cincinnati lager beer, which, if drank in sufficient quantities, is an intoxicating liquor, for the said association, and pays for it out of the society's money, the purchase and payment thereof being always made on Saturday, the last day of

each week; and the said keg is on Saturday placed in said society's hall.

"6. At the meeting on the first day of the week, commonly called Sunday, when a member of said association desires a glass of beer, it is drawn from the keg purchased for and belonging to said association, and the member, for whom it is drawn and who gets it, delivers to the treasurer five cents, which is placed in the treasury of the society, and the treasurer gets no part of it, and derives no gain or profit whatever from the same; and all of said beer left after said meeting is thrown away.

"7. The said money, received for each glass of beer drawn for and used by a member of said association, goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs, which expenses are fuel, rents of hall, newspapers, the beer used, and the donations or reliefs, payable to each member of said association who, from sickness or other mishaps, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into and direct the payment of necessary reliefs in all such cases.

"8. The meetings of said association were and are conducted in an orderly manner; and it was not the intent of said society, in its organization, nor is it the intent of its members in carrying it on, to violate the provisions of any law of the state of Indiana.

"9. On the day named in the indictment, and at a meeting of said society, at and in its said hall, the defendant, a member and the treasurer of said society, at the request of the said William Grasson, named in the indictment, who was also a member of said society, drew a glass of lager beer from the keg purchased for and belonging to said society as aforesaid, and handed it to said Grasson, who drank it in said society's hall, and said Grasson handed to said defendant, as such treasurer, five cents, which defendant immediately put into the treasury of the society, for its use and purposes aforesaid, deriving no gain therefrom.

"10. If said act of drawing and handing said glass of beer to said Grasson, and receiving and putting said five cents into the treasury of said society, under the circumstances aforesaid, constitute an unlawful sale of intoxicating liquor, for the purpose of gain, within the meaning and under the provisions of the act of the general assembly of the state of Indiana, of February 27,

1873, the defendant is guilty, and if otherwise, he is not guilty."

It is very earnestly contended by counsel for appellant that upon the agreed statement of facts, there was no sale of intoxicating liquor within the meaning of the statute upon which this prosecution is based; but conceding there was a sale, the appellant was wrongly convicted, because it is agreed "that it was not the intent of said society in its organization, nor is it the intent of its members in carrying it on, to violate the provisions of law of the state of Indiana."

Counsel for appellant say: "To sustain the conviction in this case, the defendant must have sold intoxicating liquor on Sunday, the first day of the week, to William Grasson; the sale must have been made in Marion county, Indiana; it must have been made for the purpose of gain; and the defendant must have suffered and permitted the liquor to be drank in the building, or upon the premises where it was sold."

It is conceded that, if the transaction amounted to a sale for gain, the appellant was rightly convicted upon the first ground stated. To constitute a sale there must be a passing of the right or title to property for money, which the buyer pays, or promises to pay, to the seller for the thing bought or sold. *Noy. Max.*, ch. 42; *Shep. Touch.*, 244; *Williamson v. Berry*, 8 How., 495.

Under the arrangement as agreed upon, the keg of beer belonged to the society. The appellant was the agent of the society, and if he sold in violation of law he is liable to be convicted in the same manner and upon the same principle as a bartender or a person who holds a permit under the statute in question is liable, who sells in violation of the statute. As the keg of beer when purchased belonged to the society, the question arises whether the society, by its agent, could make a valid sale of such beer to the persons composing such society. We know of no principle of law which prevents it. We know that it is the daily habit of partners to sell the firm property to the persons composing the firm, and quite frequently the members of the firm are permitted to purchase such goods or articles as they may need at cost.

When a firm purchases with partnership funds, or upon credit, a sack of coffee or a barrel of sugar, the coffee or sugar belongs

to the firm; but when a part of each is taken out and transferred to each member of the firm, either for cash or upon credit, a valid transfer has been effected from the firm to the individual members. So, while the beer was in the keg, it was the common property of the society, but when a portion was withdrawn and delivered to a member of the society, upon credit or for cash, the portion so withdrawn ceased to belong to the society and became the separate property of the member so receiving it, and the transaction invested him with the power to drink it himself, to give it away, to sell it, or to throw it away. But, says the learned counsel for the appellant, there was no gain or profit to the appellant. It is not necessary that there should be gain or profit to him. It is sufficient if the sale or transfer inured to the benefit of his principal, the society. It is agreed that each member, upon his initiation, paid fifty cents, and thereafter a monthly assessment of ten cents to form the basis of a fund for payment of expenses and reliefs of the society; and that the money received for each glass of beer drawn for and used by a member of said association goes into the society's treasury, to keep up its funds for payment of expenses, procuring refreshments, and for reliefs, which expenses are for fuel, rents of hall, newspapers, the beer used, and the donations or reliefs payable to each member of said association who, from sickness or other mishap, may require assistance; and a standing committee from the members of said society is appointed to see after and inquire into and direct the payment of necessary reliefs in all such cases. We are not informed what profits are realized from the sale of each keg of beer, but it must be considerable, or the proceeds would not be sufficient to pay expenses and furnish the necessary reliefs to the sick and unfortunate members of the society.

Parsons on Partnership says: "Any partnership would probably consent that a partner might take a part of their goods on his own account, and would charge the same to him. But without such consent, express or implied, it is quite clear that he can appropriate nothing to himself. Every partner owns the whole partnership property, subject to the equal ownership of every other partner, and no one partner can make his own ownership of any part absolute and relieve it from the incumbrance of the ownership of the others without their consent." *Par. Part.*, 168.

So, in the present case. When the society appointed the ap-

pellant its agent for the sale of its beer to the members of the association, it consented that each member might become the owner of such portion of the partnership property as he might be willing to pay for, and appropriate it to his individual use. If the transaction set out in the agreed statement of facts be not an evasion and violation of the law, then a number of persons may do that lawfully which if done by one person would be unlawful. It would be a reproach to the law and its administration if a combination of persons could, by such an arrangement, evade the law and thwart the legislative will.

Counsel for appellant greatly rely upon the case of *Commonwealth v. Smith*, 102 Mass., 144. In that case the facts were: "Several persons formed a club, of which the defendant was a member; they advanced a certain sum of money each, which was put into a common fund; the defendant was chosen agent of the club, and under instructions of the club, purchased liquors and refreshments for the club; the fund was taken by the defendant and invested for them, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club, to the extent of the money advanced by each; these checks were transferable only to other members of the club; upon presentation of the checks by any member to the defendant, he delivered to that member liquor of the club to the amount of the check presented. On several occasions the defendant had delivered liquor to the witness, as such member, upon checks; upon distributing the liquor in the manner aforesaid, it was calculated that the liquor would so far overrun the amount to be delivered upon the checks, as to leave in undelivered liquor about twenty per cent. of the original cost; and the defendant was to have this residue, to compensate him for his services as agent, and for the use of his room by the club.

"The presiding judge, in view of all the evidence, ruled that if the liquor in the defendant's possession was bought by him as agent of the club, and the liquor so purchased was that of the club, the members advancing the money to purchase the same, and if checks were distributed to each of the members according to the amount advanced by each, and defendant was a member of the club, and delivered to each member upon presentation of such checks, from time to time, the amount of liquor represented by such checks, that would be a sale by the defendant."

The court, in speaking of the above ruling of the court below, says: "One of the rulings of the learned judge of the superior court, at the trial, appears, however, to have been erroneous. The arrangement described in the bill of exceptions for the formation of a club, the purchase of liquors with their joint funds, and their distribution among the members by the agency of the defendant, may have been a mere evasion of the law. Whether it was really so, however, was wholly a question of fact, to be passed upon by the jury under proper instructions. The court was not warranted in assuming, as a matter of law, that it was necessarily an evasion, or that, as a matter of law, the facts stated, to use the language of the presiding judge, 'would be a sale.'

"It certainly might happen, and not unfrequently has happened, that a number of persons unite in importing wines, or other liquors, from a foreign country, to be divided between them according to some agreed proportion. It could not seriously be contended that the person who should receive the liquor so imported, at his place of business, and make or superintend the division among the contributors to the purchase money, is a seller of intoxicating liquors, or that they buy the liquors of him. It is difficult to see how it could make any difference that the liquors are of various kinds, and were purchased in this country instead of being imported from abroad, or that the person who is to make the distribution delivers them in small quantities, and keeps his account by means of tickets, or checks. If the liquors really belonged to the members of the club, and had been previously purchased by them, or on their account, of some person other than the defendant, and if he merely kept the liquors for them, and to be divided among them according to a previously arranged system, these facts would not justify the jury in finding that he kept and maintained a nuisance, within the meaning of the statute under which he is indicted. There would be neither selling nor keeping for sale. On the other hand, if the arrangement were mere evasion, and the substance of the transaction were a lending of money to the defendant that he might buy intoxicating liquors to be afterward sold and charged to the association, or if he was authorized to sell, or did sell, or keep any of the liquors with intent to sell, to any persons not members of the club, he might well be convicted. This, how-



ever, would be a question not of law but of fact, and would fall wholly within the province of the jury."

The only point actually decided in the above case was, that the question of whether the arrangement amounted to a sale was for the jury, and not for the court, and that the court, in assuming to decide the question, usurped the province of the jury; and for this error the judgment was reversed. In that case the liquor was purchased with money belonging to the club, and a certain number of checks, of the amount of five cents each, were delivered to each member of the club to the extent of the money advanced by each, and upon the presentation of such checks the defendant would deliver to that member liquor to the amount of the check presented. In that case, the defendant received no money. Nor was there an accumulation of a fund for the payment of expenses and reliefs.

The illustration given by the court of the importation of liquor, and its division according to an agreed proportion, applied with much greater force to that than the present case. It is quite obvious that in the case supposed, there would be no sale; but the case supposed is quite different from the one now in judgment. The present case was tried by the court, and its decision on the question of fact is entitled to the same weight as the verdict of a jury.

The case of *The State v. Mercer*, 32 Ia., 405, is much in point. The facts are stated by the court as follows: "From the evidence before us, it appears that there existed an organization called the 'Winterset Social Club,' the object of which was to supply its members with intoxicating liquors, to be used as a beverage. The manner in which this club carried on its operations is not explained further than it is shown that defendant had possession of the liquors used, and sold tickets to members of the club, which were exchanged for or given in payment of intoxicating liquors in defendant's house, by the members of the club presenting the tickets. The liquors were served out to the ticket holders and members of the club by defendant. Persons became members by signing their names in some book (but what were the contents of the book does not appear), and by buying tickets."

Upon the trial, the defendant offered in evidence the articles of association of the club, but they were excluded. The court say: "The articles of association are not in the abridgement of

the record before us. It is therefore not possible for us to determine that they were material and admissible as evidence. But if we are to consider that they were of the purport as claimed by defendant's counsel in their argument, we must conclude that they were correctly excluded by the district court.

"They appear, by the statement of counsel, to have been nothing more than the foundation of an organization, the object and intent of which was to evade the law for the suppression of intemperance, a rather clumsy device by which the defendant and the members of the 'Social Club' hoped to defeat that law, and establish a place of resort where they could be supplied with intoxicating liquors for unlawful use. The fact that, under the arrangement of selling tickets, the members of the club became the owners of the liquors to the extent of the money paid, does not make the sale of the liquors in that way lawful. The act of selling the tickets was the sale, in fact, of the liquors. It is confessed that such sales were for the purpose of supplying the liquors to the purchasers to be used as a beverage."

Having reached the conclusion, in the present case, that the beer was the property of the club, and that the appellant acted as its agent in making the sale, the ruling in the above case is entitled to much weight, and we are entirely satisfied that the transaction set out in the agreed statement of facts amounted to a sale in violation of the law.

But it is claimed that the conviction of the appellant was wrong, because it was admitted, on the part of the state, that "it was not the intent of the said society in its organization, nor is it the intent of its members in carrying it on, to violate the provisions of any law of the state of Indiana."

An eminent writer on criminal law says: "The doctrine of the intent, as it prevails in the criminal law, is necessarily one of the foundation principles of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime. And neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of our offense is the wrongful intent, without which it cannot exist." 1 Bish. Crim. Law, sec. 287.

While the doctrine as above stated is unquestionably the law, in its application to the facts of a particular case, it encounters and is somewhat modified by arbitrary legal rules which it has been found necessary to establish, in order practically to administer justice among men, and these rules are:

1. That every man is presumed to know the laws of the country in which he dwells; or in which, if residing abroad, he transacts business.

2. That ignorance of the law excuses no man.

3. That every person is presumed to intend the natural and reasonable consequences of his acts, and when he violates a law the presumption arises that it was wilfully done.

4. That ignorance or mistake in point of fact, when the person has been misled without fault or carelessness on his part, and where he believes, and has reasonable ground to believe, a certain state of facts to exist, is excused for acts honestly done while so misled. 1 Bish. Crim. Law, sec. 101; *Squire v. The State*, 46 Ind., 459.

The appellant is presumed to have known the law, and if he did not, it is no defense. There is no pretense that there was any mistake of fact. The appellant having done an act in violation of the law, the presumption is that the act was done wilfully. The question presented for our decision is, whether such presumption is overcome by the admission made by the state. That admission is to be construed in connection with all the other admitted facts; and, in our opinion, it cannot be construed as an admission that there was no criminal intent; but that the members of the association believed that their acts were not in violation of law, and that the appellant was not guilty unless the facts admitted rendered him so. This is shown by the last admitted fact: "If said act of drawing and handing said glass of beer to said Grasson, and receiving and putting said five cents in the treasury of said society, under the circumstances aforesaid, constitute an unlawful sale of intoxicating liquor for the purpose of gain, within the meaning and under the provisions of the act of the general assembly of the state of Indiana of February 27, 1873, the defendant is guilty; and if otherwise, he is not guilty."

This admission removes any ambiguity that may exist in the admission, with reference to the intent of appellant, and must control. The sole question, therefore, for our decision is, whether

the transaction, as agreed upon, amounted to an unlawful sale of intoxicating liquor.

Having reached the conclusion that the transaction amounted to a sale, we must, necessarily, hold that it was unlawful.

The judgment is affirmed, with costs.

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REGINA vs. BELMONT.

(35 U. C. Q. B., 298).

REGULATION OF TAVERNS: *Prohibiting light in bar-room—32 Vic., ch. 32, sec. 6, O—Construction of.*

The 32d Vic., ch. 32, sec. 6, O., enables the police commissioners to pass by-laws for "regulating" licensed taverns. A by-law under this authority provided that the bar-room should be closed and unoccupied, except by members of the keeper's family, or his employees, and should have no light except the natural light of day, during the time prohibited by the by-law for the sale of liquors, *i. e.*, from 12 at night to 5 A. M. *Held*, that the by-law was unauthorized, and a conviction under it was quashed.

DURING last Easter term, N. Murphy obtained a rule *nisi*, calling upon the police magistrate of the city of Toronto, and the informant, to show cause why the conviction made herein should not be quashed, on the ground that the commissioners of police, in enacting the by-law under which the conviction took place, exceeded their powers; that the by-law, so far as the 18th section is concerned, is null and void, and on grounds disclosed in affidavit and papers filed.

The by-law in question was one passed under the authority of 32 Vic., ch. 32, sec. 6, O., and it recited the 1st, 2d, 3d and 6th subsections of section 6.

Section 6 enables the commissioners to pass by-laws "for regulating the houses or places to be licensed, the time licenses are to be enforced," etc., and the "sums to be paid therefor."

And section 18 of the by-law provides: "that the bar-room of every licensed tavern in use for bar-room purposes, shall be closed and unoccupied, except by members of the family of the keeper of such licensed tavern, or by a person in his employment, and shall have no light therein except the natural light of day during

the time prohibited by this by-law for the sale of intoxicating liquors, save and except for medicinal purposes," etc.

By the preceding section, the time prohibited was after the hour of 12 at night until 5 A. M. the following day.

The conviction complained of was for unlawfully and knowingly having in the bar-room of his, defendant's, said licensed tavern a light other than the natural light of day, to wit: the light of and from a gas burner reflecting a light in said bar-room during the time prohibited, etc., contrary to the provisions of the by-law of the police commissioners.

During Easter term, *C. Robinson, Q. C.*, showed for cause, 32 Vic., ch. 32, O., and 33 Vic., ch. 28, O., authorizing the police commissioners to pass such a by-law. They have expressly given them the power to regulate taverns, etc. The by-laws must be interpreted, and it must be assumed that the commissioners were acting reasonably; and the fact that if construed unreasonably, and according to its strict letter, it might lead to unreasonable results, is no ground for quashing it. See, also, 32 Vic., ch. 22, sec. 51, O.

*N. Murphy, contra:* Sec. 19 of the by-laws, is unreasonable. Give it its effect, and the family must sit in the dark, and a servant could not go in and wind up a clock. The cause why the light was used on the occasion complained of was a reasonable one; it was to wash up the dishes used at a supper, which was concluded before the prohibited hours. It is not pretended that any liquor was sold, or that any of the evils which the act, either in spirit or the letter, intended to guard against, occurred, or were likely to occur.

MORRISON, J. It was contended that, under the power of regulating the houses or places to be licensed, the police commissioners had authority to pass a by-law such as the one in question, providing that the bar-room of any licensed tavern, and any room of such licensed tavern in use for bar-room purposes, shall be closed, and remain closed and unoccupied, except by members of the family of the keeper of the tavern, or by a person in his employment, and shall have no light therein, except the natural light of day, during the time prohibited by the same by-law for the sale of intoxicating liquors, that is, between the hours of 12 at night and 5 o'clock the following day.

The by-law provides that the bar-room shall be closed and remain closed, yet still it may be occupied by the family, which implies the opening and shutting of the room.

It also prohibits (although it may be occupied) the use of light therein, except — what is not very likely they can have after 12 at night — the natural light of day; prohibiting light from a fire in a stove, which would be necessary in the winter time for the occupation of the room by family or servants, as well to prevent the freezing of the liquids kept therein.

It goes so far as even to prohibit the light, I may say, of the moon, or the light from a gas lamp in the street penetrating the bar room.

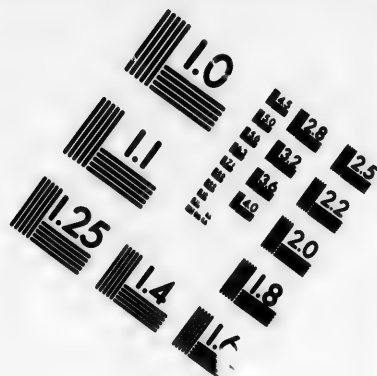
This conviction would meet the latter case, for the defendant is convicted of having, in the bar-room of his said licensed tavern, a light other than the natural light of day, to wit, the light of and from a gas burner reflecting a light in said bar-room during the time prohibited.

What is intended or meant by reflecting a light, I cannot say. Its ordinary meaning is throwing back a light; but be that as it may, in our opinion the eighteenth section of the by-law is not authorized by the statute, or within its meaning or intent.

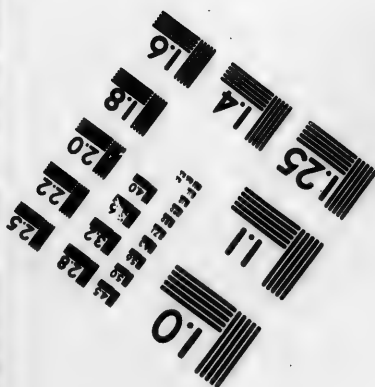
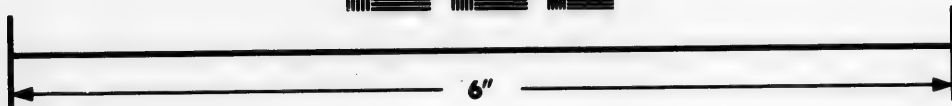
The power to pass by-laws for regulating the houses or places to be licensed, in our judgment, means regulations in respect of the sale of spirituous liquors therein, the hours and times at which they may be sold or prohibited, and with reference to the accommodation of guests, and in respect of gambling therein, and not allowing disorderly persons to frequent the premises, as provided by the sixteenth section of the by-laws.

The regulation could hardly have contemplated that the private and domestic arrangements of the family should be interfered with, or that the bar-room could not be used by the family with a light when being closed for the sale of liquor during the prohibited hours, and that a light should be an offense.

It would be most unreasonable, I think, to hold that within those hours police commissioners could prohibit the tavern keeper, or his family, or servant, during their occupation of it, from using a light, or if they were cleaning or washing the room that the using of a light would be an offense, subjecting the tavern keeper to a penalty of \$50, as provided by this by-law, or imprisonment with hard labor for six months; or, as in



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the case before us, where it appears, from the evidence returned, the tavern keeper and his servant were using the light clearing away dishes after a supper that had been provided that evening at the house.

It is not pretended, nor does it appear by the evidence, that the bar-room was open for the sale of liquors, or that persons other than the tavern keeper, his family, or servant, were therein at the time. The conviction is for merely having a light therein.

I notice that the by-law does not prohibit the use of a light during the prohibited hours in a saloon; if it is proper to prohibit the use of a light in a tavern, it is equally so in a saloon, which is only a place for drinking, and frequently a den of vice.

As an authority bearing on the case, I refer to the *Caldler & Hebble Navigation Co. v. Pilling et al.*, 14 M. & W., 76.

We are quite well aware how difficult it is for the municipal authorities to enforce regulations for the orderly keeping of such licensed houses, as well to meet the devices parties may resort to for the purpose of evading and contravening them, and no doubt it was with such a view the 18th section of the by-law was passed; but at the same time care must be taken when creating offenses to which are attached severe penalties, that the legislature has clearly given the power to do so.

On the whole, we are of the opinion that the conviction should be quashed. There will be no costs.

*Conviction quashed.*

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CEARFOSS vs. STATE.

(42 Md., 403.)

LIQUOR SELLING: *Giving — Constitutional law — Pleading — Statutory construction.*

A statute entitled "An act prohibiting the sale of spirituous or fermented liquors," etc., prohibited also the giving away of liquor on election days. The provision against giving was held not void or obnoxious to the constitutional provision that "every law shall embrace but one subject, and that shall be described in the title."

It is sufficient to charge an offense in the words of the act creating the offense, when the charge made in that form fully informs the defendant of the nature of the offense charged against him.

A statute prohibiting, among other things, the giving away of spirituous liquors on election days by any person, is held to extend to and include acts of hospitality in a private house.

Statutes are to be interpreted according to their natural and obvious meaning, and where there is no ambiguity in the language and its meaning and purpose are clear, courts are not authorized either to limit or extend the language of the act by construction.

STEWART, J. The indictment charged the appellant with a violation of the act of 1865, ch. 191, in giving to one Michael Burke, spirituous liquor, to wit: "Whisky," on the day of an election, in Washington county.

The traverser pleaded, that in his own house, he was visited by some friends, who, in the course of hospitality, partook of some whisky which he had there for his own use.

The state demurred to this plea. The court sustained the demurrer and imposed a fine on the appellant.

Under the writ of error this judgment has been brought up for our review.

In the case of *Spielman v. State*, 27 Md., 520, where the state demurred to the plea of the traverser, and judgment by the circuit court was rendered against him, upon writ of error to this court it was decided, that he could avail himself of any defect in the indictment, notwithstanding the provision of the Code, art. 30, sec. 82; that all the pleadings, in criminal or in civil cases, were open to review, under demurrer; and judgment must be given against the party whose pleading was first defective. In the absence of such demurrer he could have no such defense. *Cowman v. The State*, 12 Md., 250.

It was urged in the brief of the appellant's counsel, that the word "give," in the act in question, must be construed to mean "sell," and the offense be so described. That otherwise the act is not in accordance with the 29th section of article 3 of the constitution, declaring "that every law shall embrace but one subject, and that shall be described in its title."

The title of the act is, "An act prohibiting the sale of spirituous liquors, in the several counties of the state on the day of elections." That the act, from its title, only prohibiting the sale, is not unconstitutional, because by its first section it makes the "gift" as well as the "sale" of liquors, unlawful, has been settled by this court, in the case of *Parkinson v. State*, 14 Md., 184. See also *Franklin v. State*, 12 id., 236.

Further objection was made to the indictment because it charged the traverser with unlawfully giving "whisky" without setting forth the facts which made the "giving" unlawful.

The indictment using the terms of the law was sufficient. It is only where the act charged is not in itself unlawful, but becomes so by other facts connected with it, that the facts in which the illegality consists must be set out. 1 Chit. Crim. Law, 229.

It is not necessary to state matter of evidence unless it alters the offense. Bishop on Crim. Proc., sec. 276. See also *Parkinson v. The State*, 14 Md., 184.

The "giving" of intoxicating liquor on the day of election is declared by the law to be an offense—that was charged in the words of the act, describing also the party to whom it was given.

The indictment informed the appellant of the nature of the offense. He was enabled to make his defense, and to protect himself against the repetition of the charge in any other trial; the tribunal trying him could reach its conclusion thereon, and apply the proper punishment.

These are the purposes requiring certainty in criminal proceedings.

The act provides, "*That it shall not be lawful for the keeper of any hotel, tavern, store, drinking establishment, or any other place where liquors are sold, or for any person or persons, directly or indirectly, to sell, barter or give, or dispose of any spirituous or fermented liquors, ale or beer, or intoxicating drinks of any kind, on the day of any election hereafter to be held in the several counties of this state.*"

There is no question, as urged by the appellant's counsel, that in construing this statute the real intent of the legislature must prevail over the literal sense, if there be any inconsistency; a thing within the letter of the statute is not within the statute, unless it be within the intention of the makers. But where the words are plain, they are the best evidence of what was meant. Whilst the statute is not to be followed in its literal terms, if it can be discovered that such was not the intention, yet the meaning must be ascertained by a reasonable construction to be given to the provisions of the act, and not one founded on mere arbitrary conjecture.

When clear words are used to indicate the purpose, there is no necessity to resort to other aids. *Beale v. Harwood*, 2 H. &

J., 167. No man incurs a penalty unless the act which subjects him to it is clearly, within both the spirit and letter of the statute. Things which do not come within the words are not to be brought within them by construction. The law does not allow of constructive offenses or of arbitrary punishment. Dwar. on Stat., 247.

But when the acts are within the words of the law, there may be cases not within its spirit, or within the scope of the mischief intended to be avoided.

Whether the administration of intoxicating liquors, in good faith, for medicinal or other necessary purposes, although within the letter, would be within the mischief, is a question not necessary to be decided in this case; but if it should ever arise, we should have no hesitation in saying that it would not be an offense within the spirit of the act.

Statutes should be interpreted according to the most natural and obvious import of their language, without resorting to subtle or forced construction, for the purpose of either *limiting* or *extending* their operation. Dwar. Stat., 144.

It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case, for which the words expressly provide, shall be exempt from their operation. Story's Confl. Laws, 10.

It is only in cases where the meaning of a statute is doubtful, that the courts are authorized to indulge in conjecture, as to the intention of the legislature, or to look to consequences in the construction of the law. When the meaning is plain, the act must be carried into effect according to its language, or the courts would be assuming legislative authority. *Scott v. Reed*, 10 Pet., 524.

The intention may be gathered from the occasion and necessity of the law. *State v. Milburn*, 9 Gill, 105.

According to the express terms of this law, and the policy the legislature seemed to have in view, there is no escape from the conclusion that this case is within the letter and mischief of the law, and which cannot be avoided by the courts, without a refusal to enforce its provisions.

The words of the law, the occasion of its passage, the application to the day of election, the absolute prohibition to licensed dealers in liquors, the manifest effort to employ terms to prevent evasion, its prohibition to all persons without reservation, the extent of the penalty, its reference to any and all intoxicating

drinks, without exception as to person or place, afford undoubted evidence of the design of the legislature to discountenance their use in any of the modes specified on election days.

During the collection of the people in unusual numbers, on such occasions, with their feelings warmly enlisted, and under circumstances calculated to arouse the most active efforts of persons and parties to promote success, causing in themselves much excitement; the legislature, we take it, intended there should be no such additional element of disorder as intoxicating liquor.

All keepers of places where it was accustomed to be sold, with license otherwise to sell, are strictly and under heavy penalty, prohibited from disposing of them, in any way, on that day. They are not allowed, *directly* or *indirectly*, to sell, barter, give or dispose of such liquors.

This class of persons, by special designation, although they have paid for the license to sell otherwise, are denied the right. All other persons are prohibited from like use.

If the appellant be excepted; if he may, upon the plea of hospitality or social intercourse invite his friends to his house, and there entertain them by the use of intoxicating drinks, with impunity, other persons, without home, cannot be denied the like privilege to indulge their friends by its use, in their rooms, at the hotel, or other places of festive resort.

Where is there to be any limit? Would not such a construction of the act as tolerated such use of intoxicating drinks render the law in a great measure a nullity?

It is obvious the legislature was apprehensive of the necessity of such a law; and that there would be insidious efforts to evade it, under one pretext or another; and therefore has provided, by apt terms, against the use of intoxicating drinks, in any of the modes described, by any and all persons, on the occasion provided for.

The demands of reasonable hospitality, or the civilities of social life, can be gratified on the day of election, at least, without violation of this law.

Its provisions interpose no obstruction whatever to the obligations of hospitality. At any rate, such indulgences must be subordinated to the higher demands of the law.

Whether the legislature, in the exercise of its police authority, for the accomplishment of the purposes contemplated, have acted

with the soundest discretion or not, it was their prerogative to determine; they were the best judges as to that, and their determination is not subject to judicial review. This court has no power to measure the extent of legislative discretion or authority, unless where constitutional limitation has prescribed bounds thereto.

There can be no question of the power of the legislature to enact the law, and that this case comes clearly both within the letter and spirit of the act.

*Judgment affirmed.*

Decided 3d June, 1875.

GRASON and ROBINSON, JJ., dissented.

## HENSLEY vs. STATE.

(52 Ala., 10.)

### HUSBAND AND WIFE: *Liquor selling — Evidence.*

The husband may be criminally punished for illegal sales of liquor made by his wife in his presence and with his knowledge.

On the trial of a husband for an illegal sale of liquor by the wife in his presence and with his knowledge, evidence of former sales by the wife in his presence is admissible to illustrate the character of the sale in the case on trial.

Testimony that A. *bought* liquor of B. is evidence that B. *sold* liquor to A.

APPEAL from Circuit Court of *Etowah*.

Tried before Hon. W. L. WHITLOCK.

The appellant, Randall Hensley, was indicted and convicted under § 3618, R. C., for retailing spirituous liquors without license. One Spurlock, a state's witness, testified that within twelve months before the finding of the indictment, he went to Hensley's residence, and, in his house and presence, asked his wife for the whisky, who went to the "smoke-house" near by and got it, returning with it to the shoe bench at which witness and defendant remained while she was gone, and there delivered a pint of whisky to witness in defendant's presence. This witness further testified that "he had, on various occasions, bought whisky from defendant's wife, at his residence, during said year.



in quantities of a quart and above, and during or while witness was getting the whisky, defendant was knocking about the premises." Another witness for the state testified that "he had often got whisky from defendant's wife during the year before the indictment was found, at his residence, in quantities from a half pint to a quart, and above; that defendant was present on one occasion, and about the premises on the others, but said and did nothing in regard to the sale and delivery of the whisky."

After this, the defendant moved the court to exclude all the evidence of sales of a quart and over, on the ground that it was illegal, irrelevant, and inadmissible under the issues. The court overruled this motion and defendant excepted.

The court of its own motion charged the jury, "if they believe, from the evidence, that the wife of defendant sold whisky in quantities less than a quart, in said county, within twelve months before the finding of the indictment, in the presence or within the knowledge of the defendant, he is guilty as charged." The defendant excepted to the giving of this charge, and requested the court to give the following written charges, each of which the court refused, and to each of which refusals defendant duly excepted:

1. "If the jury believe, from the evidence, that Spurlock went to defendant's house and asked his wife in his presence for whisky, and she went to the smoke-house and got it, in a quantity less than a quart, and took it into the house in presence of defendant, and Spurlock took it away, then defendant is not guilty."

2. "The state is bound to prove a sale, and if it has failed to prove what was paid or to be paid for the whisky, then no sale is proved and the jury cannot find defendant guilty."

The various rulings to which exceptions were reserved are assigned for error.

*James Aiken*, for appellant: 1. The evidence does not show such a presence of the husband as will raise the legal presumption of coercion by him. The wife acted voluntarily in the matter, and defendant had no part or lot in it. 2 *Russ. on Crimes*, 21. The court should at least have left the question of coercion to be passed on by the jury. *State v. Parkerson*, 1 Strob., 169.

2. No sale was proved. A current price in money is essential to a sale. 2 *Bish. Crim. Law*, § 993.

3. The evidence objected to was not relevant in any point of view, and should have been excluded. 40 Ala., 720.

*John W. A. Sanford*, Attorney General, *contra*: Under the evidence, the law presumes that the acts of the wife were done under the husband's command and with his approbation, and he is answerable criminally therefor. Schouler Dom. Rel., p. 100-1; *Davis v. The State*, 15 Ohio, 72; 1 Bish. Crim. Law, § 452.

2. To buy signifies "to obtain by paying a price or equivalent in money." The testimony of the witness, that he bought the whisky is uncontradicted. The amount paid is not an element of the offense, and entirely immaterial. 2 Bish. Crim. Law, § 993.

3. The evidence of other sales was admissible to prove that accused habitually sold liquor, and that he knew and consented to the acts of his wife. *Seibert v. State*, 40 Ala., 60; *Pierce v. State*, id., 743.

MANNING, J. An offense not *malum in se*, committed by a married woman in the presence and with the knowledge of her husband, is presumed to have been committed by his authority, and he is punishable by indictment for it, if it be an indictable offense.

A witness who says that he bought spirituous liquor of a married woman in the presence of her husband, in quantity less than a quart, testifies thereby that she sold it to him in the presence of her husband. The terms "buy" and "sell" are the converse of each other, and a witness who says that he bought of another a particular article, affirms that the person with whom he dealt sold it to him. It is not necessary to say further how much or what the purchaser paid for the article. If the accused desired explanation in that direction, he should have obtained it by cross-examination, or other evidence. The testimony about other sales of liquor by the wife in the presence of the husband was admissible, for the purpose, not of convicting them, but "to illustrate the character of the sale" to Spurlock, as made by the authority of the husband. *Pearce v. The State*, 40 Ala., 720. If defendant feared that any other effect would be given by the jury to such testimony, he should have asked of the court a charge thus qualifying it.

The first charge asked was properly refused, because it as-

sumes that the witness did not buy the liquor, as he had testified he did. The second charge asked was also properly refused, for reasons hereinbefore indicated.

There is no error in the record, and the judgment of the circuit court is affirmed.

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LATHROPE *vs.* STATE.

(51 Ind., 192.)

LIQUOR SELLING: *Responsibility of employer for sale of liquor by servant.*

An employer is not criminally responsible for an illegal sale of liquor by his servant, made without his knowledge or consent, and in violation of positive instructions given by him in good faith.

WORDEN, J. Prosecution against appellant under the act of February 27th, 1873, for selling, on the 14th of March, 1874, intoxicating liquor to one Rezin Winship, a person in the habit of getting intoxicated. Plea, not guilty; trial by the jury; conviction; motion for a new trial overruled, and judgment.

The appellant claims that the evidence was radically defective in respect to two material points, viz., the habits of Winship, and the person by whom the liquor was sold to him. With regard to Winship, it may be observed that the evidence shows him to have been a substantial, industrious, well-to-do farmer, living some distance from town, of somewhat bibulous appetite, who, when in town, was occasionally given to excess, but not to such a degree as to materially interfere with his thrift, prudence or prosperity. The evidence that he was "in the habit of getting intoxicated," is not very clear or satisfactory; but as the appellant, as will be shown hereafter, treated him as a person in the habit of getting in that condition, perhaps more from the peculiar character of the times than from the actual habits of the man, we pass this point in the case without further observation.

We come to the other question: Was it shown that the appellant sold the liquor to Winship?

The appellant, it appeared, procured his permit January 31st, 1874. George M. Barrick, on whose affidavit the prosecution

was instituted, was sworn as a witness, and testified in respect to the selling as follows:

"Know Henry Lathrope; that's him; know Rezin Winship; known him for fifteen years. I saw Mr. Rezin Winship in Lathrope's saloon, on the 14th day of March, 1874; about that time. I saw him purchase intoxicating liquor there on that day. It was lager beer, it is intoxicating; he paid for that; I think he got it of Albert Randels; I may be mistaken, I won't say positive; my recollection is it was Randels; he was clerking for Lathrope in his saloon; he paid for that liquor; Henry Lathrope was in the saloon *somewhere*, in Warsaw, Kosciusko county. He drank it out of a beer tumbler off the counter." On cross-examination, he said:

"On or about the 14th day of March; it was on the 14th, if you must have it that day; I put it down in the book; I have it with me; I put it down on the 14th; I wanted to recollect it; it was my business, walking around to see if they were selling liquor in violation of law; they did not say anything about my filing affidavits; I did not ask him who I was to get my pay from; J — W — hired me and paid me; five days I worked; that is the only time I saw him take a drink in there; was not in there drinking beer every day; I drank in there three glasses of beer; I would go in and stay two or three minutes at a time. \* \* I wanted to earn my money; I reported the violation to Mr. W —; can't remember who it was that drank with him. I don't know whether I swore before Lutes that Lathrope was not there; I would not be certain as to what I swore yesterday; would not swear positively that Lathrope was there, but think he was some place in the room."

This was the only evidence in the case in relation to the selling, except that to be hereafter noticed.

Hiram F. Berst testified, that he had seen Winship in the appellant's saloon since he got his permit, drinking lemonade; that he asked for beer, but this was refused by Lathrope.

Austin C. Funk testified, that he had known Winship for twenty years, had seen him at Lathrope's saloon trying to get liquor, but that the latter, since he received his permit, invariably refused to let him have it.

Winship testified as follows:

"I have not bought any liquor of any kind of Henry Lathrope,

or in his presence, since he has been selling under his permit. Lathrope refused me every time I tried to get any; I have never got any there, except what I got that day of Randels; did not see anything of Lathrope in the building; he was not there to my knowledge; he might possibly have been in the building, but if he was, I did not see him."

Randels testified:

"Henry Lathrope gave me instructions when I commenced clerking for him, not to sell any liquor of any kind to Rezin Winship, and frequently since, he has given me the same instructions."

The appellant testified on his original examination as follows:

"I know Rezin Winship. I got my permit on the 31st day of January, 1874; I refused to let him have any liquor immediately afterwards on his first application, and have always refused him since that time; I have not sold him a drop of anything except lemonade since getting my permit, and he has never got a drop of Randels to my knowledge."

The cross-examination developed nothing material, except that the appellant had given Randels directions not to sell to Winship.

An examination of this evidence satisfies us that the conviction cannot and ought not to be sustained. It is apparent that the appellant was trying to keep within the law. He refused to sell to Winship, and gave orders to his clerk not to sell to him. Though it is questionable whether Winship should be regarded as a person in the habit of getting intoxicated, yet Lathrope, thinking doubtless, that it would be prudent and safe not to sell to him, acted accordingly. If Randels sold to him without the knowledge and against the instructions of Lathrope, the latter is not responsible criminally for the act. *O'Leary v. The State*, 44 Ind. 91, and the cases there cited; *Wreidt v. The State*, 48 id., 579. The tendency of the evidence, that of Barrick perhaps, excepted, is to show that the liquor was sold by Randels, without the knowledge or consent, and against the express instructions of Lathrope. The witness, Barrick, does not appear in a very enviable light—a hired spy and voluntary informer, he came before the court exhibiting qualities calculated to throw suspicion upon his testimony.

On his examination in chief, he fixed the time of the supposed

offense as the 14th of March, 1874 — about that time. On cross-examination, he repeated that it was on or about the 14th of March; but if it was on that day, and he knew it, having put it down in the book, why did he not say so in the first place, and not make the time indefinite by the word "about," as if to guard against contingencies? He could not remember who it was that drank with Winship. It would seem that his business and purpose should have impressed so material a matter upon his memory. But his lack of memory, either real or simulated, was remarkable; for he said that he did not know whether he swore before Lutes that Lathrope was not there; that he would not be certain as to what he swore yesterday. On his examination in chief, he said that Lathrope was in the saloon somewhere when the liquor was purchased; but on the cross-examination, he said he would not swear positively that Lathrope was there, but thought he was some place in the room. The result of his testimony in respect to the presence of Lathrope when the liquor was sold is, that he did not know, but thought he was there in the room. He does not profess to have seen him there. Indeed, if he had seen him, he would have fixed his locality in the room more definitely than "some place in the room." Nor did he assign any reason why he thought Lathrope was there. The witness did not know, but simply thought that Lathrope was there, no reason being assigned for thinking so. This evidence would not be sufficient to justify a recovery in a civil action, where the question depended upon the presence of Lathrope, much less a conviction in a criminal one.

The case was not, in our opinion, made out, there having been no sufficient evidence that the liquor was sold with the knowledge or consent of Lathrope.

The judgment below is reversed, and the cause remanded for a new trial.

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McCUTCHEON vs. PEOPLE.

(69 Ill., 601.)

**LIQUOR SELLING:** *Indictment — Responsibility of employer for unauthorized act of servant — Statutory construction.*

In a prosecution for an illegal sale of liquor to a minor, it is not necessary that the indictment should allege that the defendant knew that the purchaser was a minor.

In a prosecution for an illegal sale of liquor to a minor, it is immaterial whether or not the defendant knew that the purchaser was a minor. WALKER and McALLISTER, JJ., dissenting.

Under a liquor statute which prohibits all sales of liquors by unlicensed persons, an employer is criminally responsible for all unlawful sales made by his agent. The agent has no license to sell to any one, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption must be deemed conclusive that the agent or servant acts within the scope of his authority in making the sale.

Although it is generally true that where the legislature adopts substantially the statute of another state, it is presumed to adopt also the construction previously given to it by the courts of that state; yet the legislature will not be presumed to have adopted such construction where such construction is inconsistent with the spirit and policy of the laws of the state adopting the statute.

SCOTT, J. This was an indictment found against plaintiff in error for unlawfully selling intoxicating liquors to a minor without the written order of his parents, guardian or family physician, contrary to the form of the statute. The indictment was certified to the county court, where a trial was had and the accused found guilty, and upon an appeal taken to the circuit court, the judgment was affirmed. A motion was made in the county court to quash the indictment, for the reason it was not averred the accused knew Jay Porter, to whom it is alleged the intoxicating liquors were sold, was then a minor. The decision of the court overruling the motion to quash the indictment is assigned for error.

This prosecution was commenced under the second section of the act of 1872, in relation to the sale of intoxicating liquors, which provides, "it shall be unlawful for any person or persons, by agent or otherwise, to sell intoxicating liquors to minors, unless upon the written order of their parents, guardians or family physicians, or to persons intoxicated, or who are in the habit of getting intoxicated." Session Laws, 1872, p. 553.

The indictment is substantially in the language of the statute.

This section makes it absolutely unlawful, notwithstanding the party may have a license obtained under the provisions of the first section of the act, to sell intoxicating liquors to minors, unless upon the written order of the parents, guardians or family physicians, and contains an absolute restriction upon selling such liquors to persons intoxicated, or who are in the habit of getting intoxicated.



It is claimed the indictment is fatally defective, inasmuch as it fails to aver defendant knowingly sold liquors to a minor. It is insisted guilty knowledge is absolutely necessary to constitute the offense, and unless the *scienter* is averred, it cannot be proved on the trial. The principal authority relied on in support of this proposition is the case of *Miller v. The People*, 3 Ohio St., 475. This section of our statute is, no doubt, a substantial, if not a literal, copy of the Ohio statute on the same subject, and in construing it in *Miller's Case*, the court said, "to convict for a violation of the second section, it is necessary to aver in the information, and prove on the trial, that the seller knew the buyer to be a minor."

Having adopted the statute of a sister state, it is claimed the legislature adopted also the construction previously given it by the courts of that state. The rule on this subject is stated as we understand it in *Streeter v. The People*, 69 Ill., 595. The doctrine as there announced is, that where the legislature adopts substantially the statute of another state, it is presumed to adopt also the construction previously given it by the courts of that state, unless such construction is inconsistent with the spirit and policy of our laws.

The construction given to similar language in the Ohio statute cannot but be regarded as being inconsistent with the spirit and policy of our laws, and therefore no presumption prevails that, in adopting it, the legislature also adopted the construction that had previously obtained in that state. By our laws, every indictment or accusation of the grand jury shall be deemed sufficiently correct which states the offense in the terms and language of the criminal code, or so plainly that the nature of the offense may be easily understood by the jury. R. S. 1845, p. 181.

Since the adoption of this statute, it has uniformly been held it was not necessary to do more than state the accusation in the language of the statute creating the offense. When the intent is mentioned as an element of the offense created by law, it ought to be alleged; but when it is silent as to motive, no intent need be averred in the indictment.

The case of *Ells v. The People*, 4 Scam, 509, was an indictment for "harboring and secreting" a slave.

It was contended defendant, to be guilty of the offense, must have had knowledge of the fact that the person harbored or secreted

was at the time a slave, and that this knowledge should be averred in the indictment and proved on the trial.

It was held, however, in such an indictment it was not necessary to allege a *scienter*. The court commented on the case of *Birney v. The People*, 8 Ohio, 230, upon the authority of which the case of *Miller v. People*, *supra*, was decided, and expressly disapproved of the doctrine there announced.

The case of *Cannady v. The People*, 17 Ill., 158, was an indictment for selling spirituous liquors in less quantities than one gallon. The general averment of an illegal sale was held sufficient, the court saying these great niceties and strictness in pleadings should only be countenanced when it is apparent defendant may be surprised on the trial or unable to meet the charge, and beyond this, particularity of specification might furnish a means of evading the law rather than defending against accusation. To the same effect is *Morton v. The People*, 47 Ill., 468.

In view of our statute, which makes it sufficient to set forth the offense in the indictment or information in the language of the act creating it, or so plainly that the nature of the accusation can be readily understood, and of the uniform construction given to it by our decisions, it can hardly be said the legislature, in adopting the statute of another state, intended also to adopt a construction in direct antagonism with our laws, and in conflict with the practice that has prevailed under them through a long series of years. It is, at most, a presumption, and is repelled when we remember the construction contended for had been disapproved by this court long prior to the enactment of the law under consideration, upon the ground it was inconsistent with our laws. The presumption should rather be indulged that the present statute was enacted in view of the existing laws as construed by former decisions of this court. The latter is the more reasonable presumption, and, we think, should be adopted, as being more consistent with the spirit and policy of our laws.

Independently of the question whether it is necessary to allege a *scienter* in the indictment, it is insisted the act of selling intoxicating liquors to a minor is not itself made punishable by the statute unless the seller knew at the time the buyer was a minor. We cannot concur in this view of the law. The license procured under the first section of the act confers no authority

on the licensee to sell intoxicating liquors to a minor, except upon one condition, viz.: he shall have the written order of his parents, guardian or family physician. He is absolutely prohibited, by the same section, from selling to a person intoxicated, or who is in the habit of getting intoxicated, and his license will afford him no protection. The law imposes upon the licensed seller the duty to see that the party to whom he sells is authorized to buy, and if he makes a sale without this knowledge, he does it at his peril. This is the clear meaning of the law, and any other construction would render it exceedingly difficult, if at all possible, ever to procure a conviction for a violation of this clause of the statute. This construction imposes no hardship upon the licensed seller. If he does not know the party who seeks to buy intoxicating liquors at his counter is legally competent to do so, he must refuse to make the sale. It is made unlawful, either with or without a license, to sell to a certain class of persons, and to another class except under certain conditions; and if he violates either clause of the statute, he must suffer the penalties imposed for its violation.

It is no answer to this view to say the licensee may sometimes be imposed upon and made to suffer the penalties of the law, when he had no intention to violate its provisions. This is a risk incident to the business he has undertaken to conduct, and, as he receives the gains connected therewith, he must assume also with it all the hazards. Our laws make it a crime for a man to have carnal intercourse with a female under a certain age, either with or without her consent. It would shock our sense of justice to hold a party not guilty because he did not know she was within that age prescribed by the statute, and therefore incapable of giving consent. The law makes the act a crime, and infers the guilty intent from the act itself.

The case of *The Commonwealth v. Emmons*, 99 Mass., 6, was a prosecution against a keeper of a billiard room, for admitting a minor thereto without the consent of the parent or guardian. It was held it was not needful to aver or prove guilty intent of defendant, and that he admitted such persons to his room at his peril.

In *Ulrich v. Commonwealth*, 6 Bush (Ky.), 400, under indictment for selling liquors to a minor, it was held it was as incumbent on the vendor to know that his customer labors under disability as it is for him to know the law.

*The State v. Hartfiel*, 24 Wis., 60, was also an indictment for selling liquors to a minor. It was held it was an offense under the statutes of that state, notwithstanding the vendor did not know the purchaser was a minor.

*Barnes v. The State*, 19 Conn., 397, was a prosecution for selling liquors to a common drunkard, and to sustain the prosecution, it was declared not to be necessary to prove defendant knew the person to whom the liquors had been sold was a common drunkard.

The evidence shows conclusively that Jay Porter, at the time he purchased intoxicating liquors at the counter of defendant, was a minor, and that he had no written order from either of his parents, guardian or family physician. Whether appellant knew he was a minor, in the view we have taken of the law, is wholly immaterial. It was his business to know whether he could lawfully sell to him. We do not deem it a material inquiry whether the sale of the liquors in this case was made by appellant, his agent or servant. In either case, the principal is guilty, within the meaning of the statute, and is liable to the penalties it imposes. The agent had no license to sell to any one, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption must be deemed conclusive, that the agent or servant acted within the scope of his authority in making the sale.

The instructions given at the trial are not so variant from the principles announced in this opinion as to have misled the jury. The fourth instruction may have been wrong in its phraseology, but it is not perceived how it could have worked any injury or prejudice to plaintiff in error.

No error appearing that could affect the merits of the cause, the judgment is affirmed. *Judgment affirmed.*

Mr. Justice CRAIG, having been counsel for the defendant in the court below, took no part in the consideration of this case.

Mr. Justice WALKER and Mr. Justice McALLISTER, dissenting: We are of opinion that while it is not necessary to aver guilty knowledge in the indictment, under our statutory rule that an indictment is sufficient which charges a statutory offense in the language of the statute, it is nevertheless necessary to prove such guilty knowledge on the trial. The statute is but a copy

of the Ohio statute, which the courts of that state had, long anterior to its adoption here, given such a construction to as we contend for. The presumption is, that the legislature adopted it with the construction so given, and intended that the essential element of guilty knowledge or intent, which is the essence of every crime, should enter into that here defined.

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BALL vs. STATE.

(50 Ind., 595.)

LIQUOR SELLING: *Good faith in selling liquor to minors.*

A druggist selling liquor to a minor on a physician's prescription in good faith, that it is to be used for medicinal purposes, is guilty of no offense. He is as much shielded by the spirit of the act as if he were exempted from the penalty by express words.

BIDDLE, C. J. Prosecution, by affidavit and information, against the appellant, for selling intoxicating liquor to Albert G. Naylor, a minor. A motion to quash the proceedings was properly overruled, and needs no further notice.

The appellant pleaded not guilty, was tried by a jury, convicted and fined.

The evidence and instructions are properly before us, and errors regularly assigned questioning their validity.

*Albert G. Naylor* testified: "My name is Albert G. Naylor; am going to school at Waveland; live, when at home, at Terre Haute; I got liquor from the defendant which was intoxicating; got it for medicinal purposes; the liquor I got was called 'Warner's English gin,' put up in sealed bottles; I got the liquor on the 2d day of May, 1873, took it to my room at my boarding house, and got intoxicated on it on the 3d of May; I told the defendant, when I first went to him, I wanted it as a medicine; he refused to let me have it; I then went to Dr. Steele, after seeing him; I took a prescription from the doctor to Mr. Ball (defendant); on the prescription, I got the gin; I am sixteen years old."

On behalf of the defense, *Dr. A. F. Steele* testified: "I am a physician engaged in a general practice; have been practicing

sixteen years at Waveland; I made no examination of Naylor, but made the prescription on the statement he made of his condition, and what he had been using for the disease before, at Terre Haute; the gin was a remedial and proper medicine for the treatment of the disease that he represented to me he was laboring under." (Prescription shown him.) "I gave this prescription to young Naylor."

The defendant, *Zephaniah M. Ball*, testified: (Here the prescription was shown and read to the jury: "May 1, 1873. *R.* English gin, one bottle, for A. G. Naylor. Steele.") "The prescription was presented to me by young Mr. Naylor; he came complaining of being sick, and wanted the gin, and I told him I could not sell it to him, and refused to let him have it; he went away, and in two or three hours afterwards came back with the doctor's prescription; I then let him have a bottle of gin; it is called 'Warner's English gin,' and comes in bottles sealed up, with paper covers; this gin is an intoxicating liquor; I regarded the prescription of Dr. Steele as a *bona fide* prescription, and sold the gin to young Naylor in the utmost good faith."

Among other instructions given to the jury, the court gave the following:

"It is for the jury to determine what right defendant Ball had to sell liquor to a minor on the prescription of a physician. The defendant Ball cannot shelter himself under the prescription of Dr. Steele, even if the defendant sold the 'English gin' to this minor, on the prescription of Dr. Steele, in ever so good faith; the defendant must go a step further; he must follow the article sold, and see that it is not used for any other purpose than for medicinal purposes by such minor. And if the minor afterwards used it as a beverage you should find the man guilty."

The main rule in construing a statute is to give rational and practical effect to the intention of the law making power. All other rules fall within this fixed principle of jurisprudence. A clause in a statute which is repugnant to the general act, and cannot be construed in harmony with it, must be held inoperative; so, in construing a statute, all effects which are unnatural, absurd or unjust, must be held as implied exceptions, the same as if they were expressed in words. Thus, the law mentioned by Puffendorf, which forbade a layman to "lay hands on a priest," was held to extend only to him who had hurt a priest

with a weapon; and the Bolognian law, also from Puffendorf, which enacted that "whoever drew blood in the street should be punished with the utmost severity," was held not to extend to the surgeon who opened a vein of a person that fell down in the street with a fit. These are trite examples, but very apt. *Lindley v. Braxton*, 27 Ind., 56; *The People v. Board of Commissioners, etc.*, 3 Scam., 153.

The intention of the legislature in enacting the statute of February 27, 1873, plainly was to repress intemperance, and more particularly in section 6, on which this prosecution rests, to protect minors from the seductions of the bowl, and the indiscreet use of intoxicating drinks; and although, in its terms, the act makes no exceptions in favor of druggists or physicians in selling and administering intoxicating liquors when necessary for medical uses, yet it must not be held so inexorable as to override and destroy other rights, and prohibit the use of spirits for legitimate and necessary purposes, which are equally under the protection of the law. The instruction given to the jury by the court in this case would tend to prevent parents or employers from sending minors with prescriptions to druggists for medicines which might happen to contain intoxicating liquor; it would embarrass physicians in the administration of medicinal remedies, impose impracticable, if not impossible, duties on druggists, and often endanger the lives of patients. We cannot suppose that the legislature had any such intention in the enactment of the law; and we think that any person who sells intoxicating liquor, on a proper occasion, in good faith and with due caution, for medical purposes only, is as much shielded by the spirit of the act as if he were exempted from the penalty by express words. In this view we are fully supported by our own authorities, as well as by those of other states. *Donnell v. The State*, 2 Ind., 658; *Thomasson v. The State*, 15 id., 449; *Haber v. The State*, 19 id., 457; and *Jakes v. The State*, 42 id., 473.

We think the court erred in giving the instructions to the jury, and that the evidence is insufficient to sustain the verdict.

The judgment is reversed, and the cause remanded, with directions to sustain the motion for a new trial, and for further proceedings.



## STATE vs. WRAY.

(72 N. C., 253.)

LIQUOR SELLING: *Good faith in selling liquor to minor.*

A druggist selling liquor to a minor on a physician's prescription in good faith that it is to be used for medicinal purposes, is guilty of no offense. He is as much shielded by the spirit of the act as if he were exempted from the penalty by express words.

SETTLE, J. The defendants being indicted for retailing spirituous liquors, without a license to do so, the jury rendered the following special verdict: "The defendants were druggists and partners in the town of Shelby, and kept medicines for sale, but had no license to retail spirituous liquors. In the month of July, 1872, Dr. O. P. Gardner, a practicing physician in the town of Shelby, prescribed the use of a half pint of French brandy for Mrs. Durham, the wife of the witness, Hill Durham, and directed the witness to go to the defendants for it; that Dr. Gardner also went to the defendants and directed them to let the witness have the said brandy for his wife as medicine. The witness then went to the defendants and purchased the half pint of French brandy, and his wife used it as medicine. That French brandy is a spirituous liquor; that it is also an essential medicine, frequently prescribed by physicians, and often used, and that in this case it was bought in good faith as a medicine, and was used as such."

The letter of the law has been broken, but has the spirit of the law been violated? The question here presented has been much discussed, but it has not received the same judicial determination in all the states in which it has arisen. In this conflict of authority we shall remember that the reason of the law is the life of the law, and when one stops the other should also stop.

What was the evil sought to be remedied by our statute? Evidently the abusive use of spirituous liquors, keeping in view at the same time the resources of the state. The special verdict is very minute in its details, and makes as strong a case for the defendants as perhaps will ever find its way into court again. A physician prescribes the brandy as a medicine for a sick lady, and directs her husband to get it from the defendants, who are druggists. It may be that a pure article of brandy, such as the

physician was willing to administer as a medicine, was not to be obtained elsewhere than at the defendants' drug store. The doctor himself goes to the defendants and directs them to let the witness have the brandy as a medicine for his wife. And the further fact is found, which, perhaps, might have been assumed without the finding, that French brandy is an essential medicine, frequently prescribed by physicians and often used; and the farther and very important fact is established, that in this case it was bought in good faith as a medicine, and was used as such. After this verdict, we cannot doubt that the defendants acted in good faith and with due caution in the sale which is alleged to be a violation of law.

In favor of defendants, criminal statutes are both contracted and expanded. 1 Bish. Cr. L., par. 261. Now unless this sale comes within the mischief which the statute was intended to suppress, the defendants are not guilty; for it is a principle of the common law, that no one shall suffer criminally for an act in which his mind does not concur. The familiar instance given by Blackstone illustrates our case better than I can do by argument. The Bolognian law enacted "that whoever drew blood in the street, should be punished with the utmost severity." A person fell down in the street with a fit, and a surgeon opened a vein and drew blood in the street. Here was a clear violation of the letter of the law, and yet from that day to this, it has never been considered a violation of the spirit of the law. Perhaps it will give us a clearer view of the case if we put the druggist out of the question, and suppose that the physician himself, in the exercise of his professional skill and judgment, had furnished the liquor in good faith as a medicine. Can it be pretended that he would be any more guilty of a violation of our statute, than the surgeon was guilty of a violation of the Bolognian law? We think not. But we would not have it understood that physicians and druggists are to be protected in an abuse of the privilege. They are not only prohibited from selling liquor in the ordinary course of business, but also from administering it as a medicine unless it be done in good faith, and after the exercise of due caution as to its necessity as a medicine.

The sale of liquor without a license, in quantities less than a quart, is *prima facie* unlawful, and it is incumbent upon one who does so sell, to show that it was done under circumstances

which render it lawful. In this case we think such circumstances have been shown, and we concur in the judgment of his Honor, that the defendants are not guilty.

PER CURIAM:

*Judgment affirmed.*

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MARSHALL vs. STATE.

(49 Ala., 21.)

LIQUOR SELLING: *Sale to minor -- Barkeeper.*

A barkeeper is within the meaning of a statute prohibiting any person who keeps liquor from selling it to minors, whether he is owner or merely an employee.

On a prosecution for selling liquor to a minor, it is a good defense that the defendant was misled and imposed on, and that he honestly believed the minor to be over age. But the defendant must prove this beyond a reasonable doubt.

SAFFOLD, J. The appellant was convicted under an indictment for selling liquor to a minor.

A barkeeper, whose business is to sell fermented, vinous, or spirituous liquors, is within the meaning of R. C., § 3619, which prohibits any person who keeps these liquors from selling them to minors, etc., whether he owns the saloon or the liquors, or is merely employed to sell them.

The intention of the accused is an essential ingredient in this offense. But, in most cases, the fact is conclusive evidence of the intention. When the facts which constitute the offense are proved, the burden is thrown upon the defendant, to show that he was imposed on. In this instance, he was allowed to prove that the minor was a mature looking person, whose appearance was calculated to produce the belief that he had attained his majority. But the court properly refused to let him ask the witness whether he would not take him to be over twenty-one years old. He would not have liked an answer against him, or to have had a favorable answer offset by the opinion of an adverse witness.

Without considering separately the several charges given and refused, it is sufficient to say the court erred in instructing the jury that the fact of minority was conclusive of the intention of the defendant. In such case, the burden of proof is on the de-

defendant, and he must prove his good intention beyond a reasonable doubt. The jury must believe that he was honestly and truly misled or imposed on. Without this, the law would be of little avail for the protection of the very youth for whom it was intended, to wit, those approaching nearly their majority.

The judgment is reversed, and the cause remanded.

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EISENMAN vs. STATE.

(49 Ind., 511.)

LIQUOR SELLING: *Selling liquor to be drunk on premises — Evasion.*

In a prosecution for selling liquor to be drunk on the premises, it is not necessary to allege in the complaint, or to prove on the trial, that the liquor was drunk on the premises or anywhere.

The fact that defendant told persons to whom he sold liquor that they must not drink it on his premises is of no importance, if, under the circumstances, he must have known that they would drink it on his premises, and the evidence in this case is *held* sufficient to justify the conclusion that defendant was trying to evade the law.

DOWNEY, J. Prosecution against the appellant under the act of February 27, 1873, for selling intoxicating liquor to one Carter Loyd, to be drunk in and upon the premises where sold, without a permit, commenced before a justice of the peace. There was a conviction before the justice of the peace, and an appeal by the defendant to the circuit court.

The prosecution was upon an affidavit, a motion to quash which was made in the circuit court, and overruled.

In the circuit court, the cause was tried by the court, and the defendant was again found guilty. A new trial was asked by the defendant, on the grounds:

1. That the finding of the court was contrary to law; and,
2. It was contrary to the evidence.

This motion was overruled, and sentence was pronounced against the defendant.

He has assigned for error here:

1. Overruling his motion to quash the affidavit.
2. Refusing to grant a new trial; and,
3. Rendering the final judgment against the defendant.

The objection urged against the affidavit is, that it does not al-

lege that the liquor was drank on the premises where it was sold. The prohibition is against selling the intoxicating liquor "to be drunk in, upon," etc., without a permit. Sec. 1 of the act. It is not necessary to the completion of the offense, that the liquor shall be drunk on the premises, or that it shall be drunk anywhere. The offense consists in selling it to be drunk on the premises, without the required permit. The affidavit alleges a sale of the liquor to be drunk on the premises, without a permit, and is, therefore, sufficient.

Under the second assignment of error it is insisted, that the evidence does not show that the liquor was sold to be drunk on the premises where sold. We will examine the evidence and see what it does show. The liquor charged to have been sold was beer.

Carter Loyd testified as follows: "I never bought any liquor of defendant — no wine, nor beer, nor whisky," etc.

William H. Isgrigg: "I saw Carter Loyd buy liquor of defendant, some two or three months ago, in Decatur county, Indiana; it was beer; beer is intoxicating; it made me drunk on that occasion; he drank the liquor inside the fence in the back lot of the defendant's premises; about one-half of the back lot is fenced off to itself, and the beer was drank in the part of the lot farthest back from the saloon; I saw the liquor paid for, but do not know how much; Carter Loyd, Jesse West and I were together; Loyd bought the liquor of defendant, and we all drank it in defendant's back yard; the beer was taken out into the back yard, and the vessel returned; I took the glasses out of the saloon and drank out of them; I was at the back door when the beer was purchased by Loyd; there was nothing said about borrowing the quart cup and glasses; defendant Eisenman told us to go off the premises, and we said we would, but did not; I have seen other persons drinking in that lot where we drank; there is a small, low fence at the back part of the lot; we drank about eighty feet from the saloon, and in sight of it; there is a high fence that conceals the place; we took the glasses back, and gave them and the quart cup to the defendant."

Nathan Withers: "I have seen persons drinking in defendant's back lot several times, in the same place spoken of by William H. Isgrigg; I have seen them come back from the place, with empty beer glasses, inclosed with a fence six feet high, and

next to the livery stable; this place has been there several years; this place is about one hundred feet back of the saloon."

James T. Gillam: "Saw defendant sell a quart of beer to two men, in a quart cup, and furnish them with glasses and the vessel, but told them to go off the premises to drink it."

The defendant testified in his own behalf as follows: "I do not recollect of selling beer to Loyd, have no recollection about it; it is my universal custom to tell every man I sell to to take it off my premises; I never permitted any one to drink on my lot, and never knew that Carter Loyd and Isgrigg drank there; I have employed a man busy days to see that none drank on my premises; when I furnished the vessels and the beer and glasses, I generally tell them to go off my premises, most generally followed them to the door."

Some parts of this evidence tend to show that the defendant did not sell the liquor to be drunk on his premises, and other parts tend the other way. The statements of the defendant, made to purchasers, that they must not drink on his premises, are in his favor. But the fact that he had a place in the rear of his saloon where customers could drink under the protection of a high fence, and where, we think, he must have known they were in the habit of drinking; that he did not deliver the liquor to the purchasers in their own vessels to be taken away, but allowed them to take it out into his lot in his vessels, and use his glasses in drinking it, are circumstances from which we think the court was justified in finding that he sold the liquor to be drunk on his premises, notwithstanding his formal request that that should not be done. The place where the liquor was drunk was in view of the saloon; the defendant knew that the liquor was taken out at the rear of his saloon, in his vessels, and that the vessels were returned to him empty. This was done repeatedly. On this point we ought not to disturb the judgment of the circuit court.

It is claimed, also, that the evidence does not show, beyond a reasonable doubt, a sale of liquor. This was a question for the jury. The evidence was conflicting. It is not for us to say which of the witnesses the jury ought to have believed, and which disbelieved. Isgrigg swears to a sale.

It is also suggested that the liquor sold is not shown by the evidence to have been intoxicating liquor, within the rule of this

court, as laid down in *Klare v. The State*, 43 Ind., 483. In this case, one of the witnesses who drank of the liquor testified that it was beer, and that it made him drunk. We think this test, in connection with the opinion of the witness, should be regarded as settling the question. The third assignment of error presents no question for decision.

The judgment is affirmed, with costs.

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EFFINGER vs. STATE.

(47 Ind., 235.)

LIQUOR SELLING: *Pleading.*

A complaint for selling liquor on Sunday, which alleges the sale to have been "on or about the 2d day of November, 1873, the said day being Sunday," is bad on a motion to quash, time being of the essence of the offense.

WORDEN, C. J. Prosecution for selling liquor on Sunday. Conviction and judgment, over motions to quash the affidavit and in arrest of judgment. The affidavit on which the prosecution was based is as follows:

"State of Indiana, Jefferson county—ss: William Jones swears that on or about the 2d day of November, 1873, in said county, John Effinger, as affiant verily believes, did unlawfully sell intoxicating liquors to George Reed, for ten cents, the said day being Sunday, and the said John Effinger having then and there a permit under the then existing laws of the state of Indiana to sell intoxicating liquors."

Two objections are urged to the affidavit; first, that it is not sworn to positively, but only as the affiant believes; and second, that the time of the offense is not sufficiently stated.

We shall pass over the first objection, as the second is fatal. Time, here, is an indispensable ingredient of the offense, and where such is the case it must be accurately stated. *Clark v. The State*, 34 Ind., 436; *The State v. Land*, 42 id., 311.

The affidavit alleges that the sale was made on or about the 2d day of November, 1873, the said day being Sunday. What day is alleged to have been Sunday? Clearly the 2d of November, 1873, as no other day had been mentioned. But the sale is not



alleged to have been made on that day, but only on or about that day. The sale may have been made on some other day about that time. The affidavit states, in substance, that the 2d day of November, 1873, was Sunday, and that on or about that day the defendant sold the liquor. This is clearly insufficient.

The case cannot be distinguished from that of *The State v. Land, supra*.

The court below erred in overruling the motion to quash the affidavit.

The judgment below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

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BROWN vs. STATE.

(48 Ind., 38.)

LIQUOR SELLING: *Variance*.

Under an indictment for a sale of liquor to A., proof of a sale to A. and B., jointly, will not justify a conviction.

WORDEN, J. This was an indictment of the defendant for retailing intoxicating liquor on Sunday. It charges that the defendant, on the 6th day of September, 1874, that being the first day of the week, commonly called Sunday, at, etc., "did then and there unlawfully sell to one James Quinlan, for the sum and price of twenty cents, two drinks of whisky, the said whisky being then and there intoxicating liquor."

There was a second count in the indictment, which, on motion of the defendant, was quashed.

The defendant pleaded not guilty, and upon trial, was convicted, and judgment was rendered on the verdict, over a motion by defendant for a new trial.

During the progress of the case, the court made an order revoking the defendant's permit to sell intoxicating liquor.

On the trial, there was evidence that James Quinlan and John Nolan went into the defendant's saloon on the day named, and drank some whisky, procured from the defendant, but whether it was sold or given to them was disputed. The court gave the jury the following instruction, which was excepted to by the defendant, viz.:

"If Quinlan and Nolan went into the saloon of the defendant on the Sunday morning in question, and called for whisky, intending to purchase it of the defendant, and the defendant set it, the whisky, out to them in the regular course of his trade, intending to make a sale to them, and in pursuance of such mutual intention, he delivered the liquor to them, and they accepted it and drank it, this would constitute a sale; and if the refusal of the defendant to take the money was an afterthought, and only induced from the fear of an officer of the law who may have appeared upon the scene, it would, nevertheless, be a sale, and defendant could collect the price of the liquor in an action at law."

This charge, if it has any significance or application to the case, means that the facts enumerated by the court would constitute such a sale as would support the indictment and authorize the conviction of the defendant, all other necessary facts being proved. The jury must have so understood it. The court will not be presumed to have intended to announce a mere abstract proposition having no application to the case. The charge is erroneous in this, that it assumes that proof of a sale made by the defendant to two persons will sustain an indictment for a sale to one of them. A sale to two persons is a very different thing from a sale to one of them. *Iseley v. The State*, 8 Blackf., 403.

"Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose, but on the other hand, there should be words of severance in order to produce a several responsibility or a several right." 1 Pars. Con., 11.

We need not here trace out all the differences between a contract with one person only as the party of the one part, and a joint contract with two or more persons as the party of the one part. Nor need we discuss the consequences that flow respectively from each of such classes of contracts. They are so unlike that if one joint contractor sue alone, others being alive, he must fail upon the trial. And if one joint contractor be sued alone, he may plead the non joinder of the other in abatement, or, if it appear by the declaration that there are other joint contractors alive, who are not sued, he may demur, or he might, at common

law, have moved in arrest of judgment, or have sustained a writ of error. 1 Chit. Pl., 46.

For the error in the charge given, the judgment must be reversed.

This view renders it unnecessary for us to examine the regularity of the order revoking the defendant's permit.

The judgment below, as well as the order revoking the appellant's permit to sell intoxicating liquors, is reversed, and the cause remanded for a new trial.

Opinion filed May term, 1874. Petition for a rehearing overruled November term, 1874.

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ZEIZER vs. STATE.

(47 Ind., 129.)

LIQUOR SELLING: *Evidence.*

In a prosecution for selling liquor to a person in the habit of getting intoxicated, the complaint must allege and the proof show that such person was in the habit of getting intoxicated at the time the sale was made to him.

DOWNEY, J. This was a prosecution against the appellant under the liquor law of 1873. The action was commenced before a justice of the peace, where, after conviction, the defendant appealed to the circuit court. In the circuit court there was a motion by the defendant to quash the affidavit, which was overruled. On plea of not guilty there was a trial, a finding of guilty, a motion for a new trial overruled, and sentence pronounced against the defendant. Here it is assigned as error, among other things, that the court improperly refused to quash the affidavit, and to grant a new trial.

The affidavit, in substance, charges that the defendant, at a previous date, sold to the affiant intoxicating liquors, and that the affiant was, at the date of the making of the affidavit, in the habit of being intoxicated. It is not alleged that the purchaser of the liquor was in the habit of being or getting intoxicated at the date of the sale of the liquor.

The sixth section of the act is as follows: "It shall be unlawful for any person, by himself or agent, to sell, barter or give

intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated." Acts 1873, p. 154.

The fourteenth section provides the penalty for violating section 6.

We think the pleader has in this case, and in this respect, followed too closely the letter of the statute.

It is alleged, speaking of the date of the affidavit, that the purchaser "is a person in the habit of being intoxicated." We think it should have been stated that the purchaser was at the time of the sale in the habit of getting intoxicated.

The affidavit alleges that the sale was on the 1st day of November, 1873. The trial was on the 12th day of February, 1874. The only evidence as to the habit of the purchaser was this: "It is admitted that Chancey B. Lewis is a person in the habit of being intoxicated." The allegation and the proof should have fixed upon the purchaser the habit of getting intoxicated at the time when the sale was made. Evidence of his habits within a reasonable time before sale would have been admissible, as tending to show what his habit was at the time of the sale.

There are other questions made, which, however, it is unnecessary for us to decide.

The judgment is reversed and the cause remanded, with instructions to sustain the motion to quash the affidavit.

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STATE *vs.* BIDDLE.

(54 N. H., 379.)

LIQUOR SELLING: *Question of fact.*

Whether ale or cider is an intoxicating liquor is a question of fact, and not of law.

LADD, J. Whether ale and cider are intoxicating liquors, depends upon whether or not those beverages, being drank, produce intoxication. That is, the question is as to the effect those liquors produce upon the human system when taken into the stomach. In chemistry, two inorganic substances are brought together, and the result noted. This is called an experiment. The result, which is nothing more than a manifestation of a law

of nature, under certain conditions, is a fact. By the careful and patient observation of a great number of experiments of this sort, a great number of facts are obtained. The wonderful forces that lie concealed in inanimate matter are thus brought to light, and with the discovery of each new fact the elements are brought more and more into subjection to the will of man, and turned to his use. Courts, charged with administering the municipal law, do not generally undertake to determine these facts of science, notwithstanding they may be universal, and may rest upon the laws of nature, which are at once universal and immutable. Experts are brought in for that purpose, and the testimony of experts is addressed to the jury.

So, in the science of medicine, *a priori*, the effect of a given substance, when taken into the stomach, could hardly be foretold, I suppose, by the simple exercise of reason. The knowledge of the physician, as well as the chemist, comes largely from experiment. The physician must know, not only the effect which inorganic simples produce, one upon another, but also what effect they may be expected to produce upon the organism of his patient. Whether ale or cider produces intoxication, may be learned in the same way, that is, by experiment. Any person, who has seen and observed a number of such experiments, may, as a witness, state the result of his observation to the jury. Any person who has performed the experiment himself may also testify to the knowledge gained in that way; but the witness in both cases is doing nothing more than stating a fact. The question is, fundamentally, a question of fact, and there is no conceivable view in which anything else can be made of it.

There are undoubtedly laws of nature, the existence and operation of which courts, as well as other persons endowed with ordinary intelligence, assume. Some of the laws of light, some of the laws of heat, some of the laws that govern falling bodies in their descent to the earth, some of the laws of hydraulics, are matters of such constant observation, experience and knowledge, that no one would think of requiring them to be proved. Such knowledge on the part of the jury is assumed, in the same way as it is assumed that they possess consciousness, memory and reason. Yet such common knowledge does not convert what is essentially matter of fact into matter of law. The moment we go beyond the range of common experience and common

knowledge in our investigation of any of the laws of nature, we enter the domain of science; all the difference is, that, while one set of facts is known and acted on by all men, the other may be known only to a few who have devoted much time and study to that particular subject.

If it were known with absolute certainty that all fermented ale and cider invariably produce intoxication, it would still remain a fact that they are intoxicating liquors, just as much as though the matter were in dispute and the evidence conflicting. Does a fact, ascertained to be universally true, thereupon become part of the law of the land?

In *Nevin v. Ladue*, 3 Den., 437, Chancellor Walworth, to show that ale was within the terms of a statute of New York prohibiting the sale of "strong or spirituous liquors" at retail without a license, examines the history of that beverage from the remotest antiquity. He shows that it was in universal use among the Egyptians in the earliest times, its invention being ascribed to Osiris, the Bacchus of that ancient people, and holds that the "strong drink," spoken of in the Scriptures, was a liquor produced by the fermentation of grain in water, and that, as the vine did not flourish in Egypt, it probably was *oinos kris-thinos*, or barley wine, that Joseph gave to his brethren on their second visit to that country to buy corn, when they drank largely and became intoxicated, as the Hebrew text clearly indicates; or, in the language of our translation, drank and were merry with him. He quotes Herodotus and Xenophon, Tacitus and Diodorus, Siculus, Tertullian and Ovid, the learned president, De Goqnet and Pliny, Hebrew lexicons, French lexicons, encyclopedias, books of history, books of travel, books of science. "At what time beer was first introduced into England," he tells us, "is uncertain, but it was probably in use there very soon after the discovery of that country by the Romans, if not before; for, according to Morewood, Dioscorides, who wrote in the time of Nero, records the fact that the British and Irish then used an inebriating liquor, called *curmi*, made from barley. Morewood also states that the manner of making the ale or beer by the ancient Britons and other Celtic nations is thus described by Isidorus, and by Orosius, who was a disciple of St. Augustine: "The grain was steeped in water, and made to germinate, by which its spirits were excited and set at liberty, and it was

then dried and ground, after which it was infused in a certain quantity of water, and, being fermented, it became a pleasant, warming, strengthening and intoxicating beverage."

"This liquor," the learned chancellor continues, "was called by the people of Spain, *celia* or *ceria*. The Britons, as we have seen, called it *cumri*; and in Germany and Gaul, as well as amongst the Romans, it was called *cerevisia*—from *Ceres*, the goddess of grain, and *vis*, power or strength. Its proper name in the English language, therefore, is strong liquor or strong drink. Burkhardt, Salt, Bruce, and other modern travelers in Egypt, Nubia, Abyssinia, etc., mention a similar liquor still in use in those countries, under the name of *bouza*, which is made by fermenting barley and other farinaceous substances, with water, but without malting the grain, which makes a strong and inebriating drink, and is in extensive use; and an evidence of its intoxicating qualities is the fact stated by one of those writers that it is sometimes used to catch monkeys, who, like the bipeds they are so apt to imitate, are inclined to partake of the pleasures of the inebriating cup, without duly considering the consequences. To effect his object, the monkey-catcher places a vessel filled with *bouza* at the foot of the tree on which the animals are gamboling, and then watches at a distance until they come down and regale themselves to intoxication, and we, who have seen the effect of similar proceedings elsewhere, can readily imagine what is the inevitable result of this stratagem to the boozy monkeys."

The result of the learned chancellor's very entertaining and instructive discussion is, to show that for many hundred years and in many different countries, a liquor, similar to ale, made by fermenting grain with water, has been known and used, that it has been spoken of by many writers, sacred and profane, as strong drink, barley wine, etc., and that its effects have always been described as inebriating. The evidence thus laboriously collected would doubtless go far to satisfy a candid mind that ale is, in point of fact, an intoxicating liquor, or, at least, that it has been observed to produce that effect on men, as well as monkeys, by a great number of intelligent and veracious writers, during a period which covers a large portion of the known history of the world. If the question were simply whether ale is intoxicating, it would doubtless strike one as sufficiently ludi-



crous that the books should be ransacked for two or three thousand years back to obtain evidence by which to determine the point, or that hearsay evidence of an experiment performed upon a monkey with a liquor somewhat resembling ale should be sought out and considered, when direct evidence of the effect of real ale upon a man must have been easy of attainment, even in New York. Of course, no such thing was in the mind of the learned judge who delivered this somewhat facetious opinion. The object of the discussion was to show that, by the true construction of the statute, the sale of ale came within its prohibition. Still, it seems to me that the conclusion is nothing less than this: that because ale, or a fermented liquor resembling it has always and universally been understood to be intoxicating, that fact has, therefore, become incorporated into the municipal law of the state, and to this conclusion I cannot agree. If the legislature had intended, absolutely, to prohibit the sale of ale, leaving no question as to its intoxicating qualities to be settled by anybody, it was easy for them to have said so in a single word. What they did was to prohibit the sale of all intoxicating liquors, leaving it to be determined, in some way, by the tribunal charged with administering the law, whether the particular case comes within the general terms of the prohibition. Where is the legal test with which the courts are to determine the question? Suppose here are twenty different kinds of liquor, each containing a different percentage of alcohol, from one to twenty, what is the shape of the legal formula with which the court are to draw the line between that which is intoxicating and so within the legislative prohibition? The truth is, the question is essentially one of fact, and I, for one, see no reason why a fact so obvious or well known as to require little or no proof should be withdrawn from the jury and settled by the court, any more than one less obvious, with respect to which the evidence may be doubtful or conflicting.

The terms of the ruling in the present case give special prominence to the process of fermentation. Indeed, they seem to imply that the completion of that process is the criterion whereby to determine whether the liquor is intoxicating or not. In point of fact this may be so. But it is difficult to see how anything is thereby gained, unless it be first ascertained with certainty that fermentation always produces intoxicating liquors.

It is plain that if one fermented liquor is intoxicating and another not, we are no nearer a legal solution of the matter, when we are informed that the particular cider or ale in question is fermented than we were before. The ultimate question, Is ale or cider intoxicating liquor? still remains unanswered. As to the effect of fermentation, we have the excellent authority of the learned chancellor, from whose opinion I have already quoted so much at length. He says, "But the term, fermented beer, in the connection in which it was used before the justice, might well have been understood by Nevin as intended to cover a charge of selling some of the various kinds of beer which have long been in use in this country under the different names of spruce beer, spring beer, ginger beer, molasses beer, etc. Each of these may very properly be termed fermented beer, as fermentation to a certain extent is necessary to fit the article for use. What was denominated small or table beer in England was a different article from any of these, and was an excisable liquor under the general name of beer. For it differed from porter only in its strength, and being sold at a smaller price; it was for that reason charged with a lower rate of duty under the English statutes. But the other kinds of beer to which I have alluded were never considered as strong liquors, or intoxicating beverages, either here or in England, and therefore were not excisable articles. They do, indeed, contain a certain amount of alcohol, as every liquid containing saccharine matter does, immediately after the vinous fermentation has commenced. But they have not been considered as strong drinks, or intoxicating beverages, either because it was supposed that the human stomach had not capacity to contain a sufficient quantity of those kinds of beer, if they were properly made, to unduly or injuriously excite the person who used them as a beverage, or for the reason that those who were in the habit of using them never got intoxicated by such use." In *State v. Adams*, 51 N. H., 568, SMITH, J., states the scientific fact that alcohol may be obtained by distillation from fermented milk.

Upon this authority it is safe enough to say that neither fermentation nor the presence of alcohol can be adopted as an absolute legal test to determine whether any liquid is intoxicating or not, inasmuch as there are fermented liquors containing alcohol, which, like milk, do not inebriate.

Our statute, by using the word spirituous, forbids the sale and keeping for sale of certain specified liquors, that is, such as are obtained by distillation. The generic term, intoxicating, also found in the statute, is of much broader signification. It is true, the provision found in section 24 of the liquor law, to the effect that nothing in the act shall be construed to prevent the sale or keeping for sale of domestic wine or cider unmixed with spirituous liquor, except when sold to be drunk on or about the premises where sold, implies an understanding on the part of the legislature that cider might come within the general prohibition of the act; but they carefully refrained from mentioning that beverage by name, and thus left it with the large class of liquids, such as wine, ale, porter, beer, etc., known to contain more or less alcohol, prohibited or not, according to the fact of its intoxicating quality.

We are of opinion that as to all liquors except those specially designated by the term "spirituous," before the act can be applied to them, it must be ascertained in a legal way that they come within the definition. This, as already more than once remarked, is clearly an unmixed question of fact, and we see no ground upon which it can legally be determined, as matter of law, by the court. We are therefore of opinion that the ruling was erroneous, and that the verdict *Must be set aside.*

(*State v. Long*, 74 N. C., 121, is an authority to the same effect.)

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LATHROPE vs. STATE.

(50 Ind., 555.)

LIQUOR SELLING: *Intoxicating liquor.*

Whether or not lager beer is intoxicating is a question of fact, and not of law. BIDDLE, C. J., dissenting.

PETTIT, J. This was a prosecution under the act of February 27, 1873, for giving intoxicating liquors to a person who was in the habit of getting intoxicated.

The only question in the case is, Was the evidence sufficient to sustain the conviction? All the evidence as to the kind or quality of the liquor given or drunk was this: Mrs. Woods testified: "Saw him, Maggart, drink beer; did not see any one give it to

him. \* \* Lathrope called for it; said it was fresh beer; can't remember what they called it; saw the keg in the case."

Mrs. M. H. Frazier testified: "Know Wm. P. Maggart; it was on the 30th day of April he was intoxicated; have seen him twice since then; he was in the saloon then; I saw him drinking intoxicating liquors there; they were standing at the lower end of the counter; he, Henry Lathrope, said it was fresh beer; I said to Mrs. Woods, 'there is a very drunk man drinking beer;' he had beer in his hands when I saw him; Lathrope said afterward, it was some one else's treat; Mr. Randel was behind the bar; don't know what it was; have heard the same kind called lager beer: drawn from keg on east end of counter; it was about the middle of the afternoon." Cross-examined: "They had the beer in their hands at the time when I saw them; there were three or four drinking at the time; don't remember any other beer being set up; don't remember of hearing before we went in; don't know who called it out; my best judgment is that it was beer; it is merely my impression that it was beer; never drank any myself."

This does not prove that the beer was intoxicating liquor, and following the well considered case of *Klare v. The State*, 43 Ind., 483, we hold that the evidence was not sufficient.

The judgment is reversed, with instructions to sustain the motion for a new trial.

BIDDLE, C. J. I dissent. The evidence, in my opinion, shows that the kind of liquor sold was "called lager beer." This, I think, was sufficient, uncontradicted, to authorize the finding as to the character of the liquor. That "lager beer" is intoxicating, is a fact which must be judicially known, without special proof.

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BIGGERSTAFF vs. COMMONWEALTH.

(11 Bush, Ky., 169.)

PERJURY.

Perjury cannot be assigned on an oath administered by a judge of election who has not been himself sworn.

LINDSAY, J. This prosecution was based upon the 14th section of the 12th article of chapter 32 of the revised statutes,

VOL. I. — 32

which is in these words: "Any person who shall make any wilfully false statement under an oath duly administered at an election shall be deemed guilty of perjury, and incur the penalty for that crime." The indictment charges that the accused, on the 23d day of September, 1872, in the county of Madison, falsely and corruptly swore that he was twenty-one years of age, when, in point of fact, he was not that old, and knew at the time he was not; and that he so swore in order to procure the right to vote; and that by means of said oath he succeeded in being allowed to vote in an election then being held for sheriff of said county. It is further charged that said oath was "duly administered by the officer and judge of said election."

Appellant demurred to the indictment, but his demurer was overruled. He was then tried and convicted, and sentenced to one year's confinement in the state penitentiary. To reverse the judgment of the circuit court he prosecutes this appeal.

It was proved on the trial, by D. B. Willis, that he acted as one of the judges of the election, and that he administered the oath which appellant is charged to have falsely and corruptly taken. He proves, further, that he (Willis) did not take the oath prescribed by law for judges of election, and that he was acting, at the time appellant was sworn, as a judge of the election, without having taken said oath.

Upon this evidence the accused asked the court to give the following instruction: "If the jury believe, from the evidence, that the defendant was sworn by D. B. Willis only as a judge of the election, and that Willis, as such judge, had never been sworn to perform his duties, then they should find the defendant not guilty."

It appears that Willis was, at the time, a justice of the peace; but as section 7 of article 3, chapter 32 of the revised statutes provides that oaths, which persons offering to vote at elections held under the provisions of that chapter may be required to take, shall be administered by one of the judges or by the clerk of election, he had no power or authority, as justice of the peace, to administer the oath to the accused; and the necessary and legal presumption is, that in administering said oath, he acted in the capacity of judge of the election.

Section four of the chapter and article in question provides that "each judge and clerk of an election shall, before entering

on the duties of his office, take the oath prescribed by the constitution before some justice of the peace, or it may be administered by the sheriff."

If Willis assumed to act, without taking the oath, he was, at most, but an officer *de facto*. To what extent his acts would be upheld, in order to protect and preserve the rights of legal voters voting at the elections, in controversies between rival candidates for office, we will not undertake in this case to determine. The question here is, whether Willis was authorized by law to administer the oath to the accused. If he was not so authorized, it would seem to follow that the judgment of the circuit court can not be sustained.

No oath taken before "those who take upon them to administer oaths of a public nature without legal authority . . . can ever amount to perjury in the eye of the law, for they are of no manner of force." Rose. Crim. Ev., see 674; 2 Russ., 521; 1 Hawk. P. C., ch. 69, sec. 4; 3 Camp., 432.

Where oaths are administered in a regularly organized court, and it appears, *prima facie*, that the judge, magistrate or officer before whom the oath was taken was *de facto* in the ordinary exercise of his office, the burden is devolved upon the prisoner of showing the want of proper legal authority. But this rule is applicable only to public functionaries; and where the authority to administer the oath was derived from a special commission, or where it is delegated to be exercised only under particular circumstances, the commission, in the one case, or the existence of the essential circumstances in the other, must be distinctly proved. 3 Greenl. on Ev., sec. 190.

At the common law the authority of the officer administering the oath was always open to inquiry. The existence of that rule was recognized and continued in force by the revised statutes, section 2, article 8, chapter on crimes and punishments, which provided "that if any person, in any matter which is or may be judicially pending, or on any subject in which he can legally be sworn, or in which he is required to be sworn, *when sworn by a person authorized by law to administer an oath*, shall wilfully and knowingly swear, depose, or give in evidence that which is untrue and false, he shall be confined in the penitentiary," etc.

An essential prerequisite to the establishment of the guilt of the accused is, that the oath shall have been administered "by a

person authorized by law to administer an oath." If Willis did not take the prescribed oath of office, he was not authorized by law to act as a judge of the election, and could not therefore have been authorized to administer such oaths as the laws make it the duty of the judges and clerks of election to administer.

The rule founded upon public policy, which requires the acts of *de facto* officers to be treated for many purposes as valid and binding, does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury.

From these conclusions it follows that the instruction under consideration should have been given. As we have no power to reverse for an error of the circuit court, in overruling a demurrer for an indictment, we will not inquire as to the sufficiency of the indictment in this case. Nor do we deem it necessary to advert to other supposed errors to which our attention was called in the argument.

For the error in refusing to give the instruction heretofore set out in full, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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COMMONWEALTH vs. GRANT.

(116 Mass., 17.)

PERJURY: *Materiality of testimony.*

A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also in swearing falsely and corruptly as to material circumstances tending to prove or disprove such fact, and this without reference to the question whether such fact does or does not exist. It is as much perjury to establish the truth by false testimony as to maintain a falsehood by such testimony, and the fact that the former may lead to a correct decision is immaterial.

In *Commonwealth v. Grant*, which was a prosecution for perjury, the facts were as follows: The respondent Grant had prosecuted a woman named Linnell for larceny. She defended on the ground that she had been married to Grant, and was his wife. She testified that she had been married to him by a minister in Providence, R. I., and had afterwards lived with Grant, and been introduced by him as his wife, and she produced a certificate of the marriage which, however, the district attorney ad-



mitted on the trial, was a forged document. There was no direct evidence that Grant had been married to the woman, except her own testimony. There was other evidence that he had represented her as his wife. Grant on the trial of the larceny charge, testified that he had never been married to her, never had lived with her as her husband, although he admitted he had lived with her, and never had acknowledged her as his wife. For giving this testimony he was indicted for perjury. On the trial of the indictment for perjury, the defendant's counsel claimed that he could not be convicted of perjury unless he had actually been married to the woman, or had gone through a marriage ceremony with her, for the reason, as it would appear, that as the woman could only defend against the charge of larceny on the ground that she was or believed herself to be his wife, the fact that Grant had represented her to be his wife was immaterial to the issue. The trial judge, however, ruled otherwise, and instructed the jury that if Grant had represented the woman to be his wife, he was guilty of perjury, even though in fact he never had married her, or gone through a ceremony of marriage with her. Being convicted, this instruction was assigned for error. The supreme court sustained the ruling of the trial judge. The opinion of the court was delivered by DEVENS, J., who uses this language:

"A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact. He cannot in the latter case exonerate himself from the offense, because while the circumstances to which he thus swore did not exist, the fact sought to be established by them did exist. Even if the defendant was not married to Linnell, if he corruptly and falsely swore that he had not so represented, that he had not lived with her as his wife, and had not made an agreement of separation with her, this testimony was material in the decision of the issue as presented to the police court, and might therefore be properly included in the assignment of perjury contained in the indictment. The offense of the defendant consisted in making false statements intended to corrupt the administration of justice, by inducing the magistrate to render a decision based thereupon, and it is not the less an offense because the decision was in fact correct.

*Exceptions overruled."*

## STATE vs. HEED.

(57 Mo., 252.)

PERJURY: *Evidence — Reasonable doubt.*

On a trial for perjury to justify a conviction on the evidence of one witness, it is not necessary that such witness should be corroborated by additional circumstances equivalent to the oath of a second witness. The evidence to sustain a conviction must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence.

It is the duty of the court when charging the jury that they must be satisfied beyond a reasonable doubt of the respondent's guilt to explain what is a reasonable doubt.

WAGNER, J. The defendant was indicted in the Mercer county circuit court for perjury, and convicted of that crime.

The material charge in the indictment was, that on a trial before a justice of the peace, wherein the defendant was plaintiff, and one Willis Campbell was defendant, the plaintiff swore that on a certain occasion, Campbell drove through his inclosed field. The only direct testimony to the falsity of the defendant's oath was given by Campbell; but there was some other testimony which had a tendency to corroborate or sustain him. Defendant also introduced other witnesses who, in a certain degree, supported the truth of his evidence before the justice.

We have no intention of commenting upon the evidence, as had the jury found either way, there would have been testimony on which they might have found their verdict.

The only question necessary to notice is presented by the declarations of law given by the court.

The first instruction given for the state was to the effect, that if the jury believed, beyond a reasonable doubt, that the defendant in the suit before the justice of the peace, wilfully, corruptly and falsely testified that Campbell drove his wagon and team through defendant's inclosed field, they should find him guilty.

The second instruction for the prosecution was, that the jury could not acquit from a mere possible doubt; but that it should be a reasonable doubt.

The first instruction given for the defendant told the jury, that the evidence of the defendant in the suit before the justice of the peace was presumed to be true, and that the presumption must be removed by the evidence of two witnesses, or the evidence of

one witness with such other corroborating circumstances as were necessary to overcome the presumption and establish his guilt.

The fourth instruction which was asked by the defendant and refused by the court asserted the proposition that, before the jury could convict, it was necessary to establish the falsity of the oath taken by him by the evidence of two witnesses, or by the evidence of one witness, with such other corroborating circumstances as would be equal to a second witness.

The above are the only instructions requiring any note, as the correctness of the ruling in the others cannot be disputed. The instruction in reference to a reasonable doubt is faulty and subject to criticism. It should have been followed by a more precise and accurate explanation of the terms, so as to have prevented misapprehensions, as was done in the case of *The State v. Nueslein*, 25 Mo., 111, and which has been universally followed since that time.

The fourth instruction asked by the defendant stated the law too broadly, and was properly refused. Says Greenleaf: "In proof of the crime of perjury also it was formerly held that two witnesses were necessary, because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict." But this strictness has long since been relaxed; the true principle of the law being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence. The oath of the opposing witness, therefore, will not avail, unless it be corroborated by other independent circumstances. But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner as though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances, before the party can be convicted. The additional evidence need not be such, as standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose; but it must be at least strongly corroborative of the testimony of the accusing witness; or in the quaint but energetic language of PARKER, C. J., a "strong and clear evidence, and more numerous than the evidence given for the defendant" (1 Greenl. Ev.,

257). The instruction was an attempt to apply the ancient rule which has been modified and relaxed, and no longer prevails in any of the courts.

The first instruction which was given for the defendant, whilst mainly stating the law correctly was not as clear and explicit as it should have been. It is true, as it was given for the defendant he cannot complain; but in cases of this kind, we examine the whole record to see whether justice has been done, and it will therefore become necessary to examine it in connection with the first instruction given at the instance of the state. That instruction made no allusion to the character of the crime, nor to the peculiar amount of evidence required. It was such an instruction as would have been given in an ordinary case, and made it only necessary for the jury to be satisfied by the evidence of the defendant's guilt. The instruction was clearly and wholly bad, and should not have been given. It was to some extent cured by the defendant's instruction, but not entirely so. There was an inconsistency as to the amount of proof required; and we cannot tell what effect it had upon the jurors. When we consider that the bad instruction was given for the state, and that the state had the closing of the case, we can readily see how the defendant could have been injured.

It cannot be said in this case that the instructions, even taken together, fairly presented the law.

I think therefore that the judgment should be reversed and the cause remanded; all the judges concur, except Judge SHERWOOD, who is absent.

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#### HEMBREE vs. STATE.

(52 Ga., 242.)

#### PERJURY: *Indictment.*

Where, in an indictment for perjury, it was alleged that the defendant, during a judicial proceeding, etc., had falsely sworn to certain statements, and then immediately followed an allegation that certain of such statements were untrue, and there was no allegation that the statements, thus alone denied to be true, had been material to the issue on trial, nor did they of themselves appear to have been material: *Held*, that the indictment was demurrable, and should have been quashed.

CRIMINAL LAW. Indictment. Perjury. Before Judge KNIGHT. *Milton* Superior Court. August Term, 1873.

George Hembree, was placed on trial for the offense of perjury, upon the following indictment:

"GEORGIA — *Milton county*.

"The grand jurors, selected, chosen and sworn for the county of *Milton*, to wit:

"In the name and behalf of the citizens of Georgia, charge and accuse George Hembree, of the county and state aforesaid, with the offense of perjury. For that the said George Hembree, in said county, on the 23d day of August, 1871, wickedly and maliciously intending to aggrieve one Martha Goen, and put her, the said Martha Goen, to great expense, and to bring upon her, the said Martha Goen, great disgrace, and also to cause her, the said Martha Goen, to suffer the penalty of the law consequent upon a conviction of the offense of living with one William Martin, a male person of color, in a state of fornication, a bill of indictment for which offense being then and there submitted to the grand jury of said county, said superior court being then and there in session, charging said Martha Goen and William Martin with living together in a state of fornication, said Martha Goen being then and there a white female; the said George Hembree, on the day and year aforesaid, in the county aforesaid, and in proper person before said grand jury, one Marian J. Seall, then and there being foreman of said grand jury, and in due form of law, was sworn and took his corporal oath upon the bible concerning the truth of the testimony he should then and there give said grand jury, as to the truth of the charge in said bill of indictment then and there contained, said foreman of said grand jury then and there being legal and competent authority to administer said oath to the said George Hembree for said purposes. The said George Hembree being then and there so sworn, as aforesaid, then and there upon his oath aforesaid, before the said grand jury (said grand jury then and there having competent authority to administer said oath and to hear said evidence in that behalf), wilfully, knowingly, absolutely, falsely, in his testimony, did then and there swear, among other things, in substance and to the effect following, to wit: "I went to Mrs. Martin's to get some soap; as I went, I saw James Martin in the field plowing; I went to him; as I went I saw Mrs. Goen

going a round-about way towards Bill Martin. I thought something was going to happen, and I got up on the fence, and saw them meet in the plum orchard. Mrs. Goen lay down and pulled up her clothes; Bill then got on her. I then left the fence and went to the house; Mrs. Goen then came to the house; I know it was her I saw.' Whereas, in truth and in fact, the said Martha Goen did not then and there go to said plum orchard, nor meet one Bill Martin, as aforesaid, and so the jurors, upon their oaths aforesaid, do say that the said George Hembree, on said 23d day of August, 1871, in the county aforesaid (the said grand jury then and there having such competent authority to administer said oath as aforesaid), by his own act and consent, and after his own wicked and corrupt mind, in manner and form aforesaid, wilfully, knowingly, absolutely and falsely, did commit the offense of perjury, contrary," etc.

The defendant demurred to the indictment. The demurrer was overruled and the defendant excepted.

*T. M. Peeples, Irwin, Anderson & Irwin*, for plaintiff in error. *C. J. Wellborn*, solicitor general, by *C. D. Phillips. Thomas F. Greer*, for the state.

McCAY, J. It is the settled rule that the indictment in a charge of perjury must show that the thing falsely sworn to was material to the issue on trial. 3 Greenl. Ev., 189. Under our statute, perhaps, it is sufficient if this appear from the words themselves, as set out, though there be no *allegation* that they were material. Code, sec. 4628-9. In this case were the whole of the words negatived; were it charged that *all* the words spoken were untrue, the words might be taken to be material, on their face, to the issue as described in the bill of indictment, for though they assert only one act, they would be material, with other acts, to make out the charge of living in fornication.

But, singularly enough, the indictment does not negative the principal statement, and by selecting the others and negating them, the inference is open that the principal statement is true. It may have been material to show that the woman charged did go to that particular field that day, and meet the man she is charged to have been living with in a state of fornication, but it is not apparent, by the words themselves, that they were material. Whilst we are no friends of technical rules, there are yet

limits, especially in criminal cases, beyond which it is not safe to go, and we think it must always be alleged that the words sworn were material, or they must in the nature of them, show their own materiality. That is one of the statutory ingredients of the crime, and it can no more be dispensed with than the allegation that the words were false.

*Judgment reversed.*

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PEOPLE vs. HUNCKELER.

(48 Cal., 331.)

PRACTICE: *Former jeopardy.*

Where a person has once been put on trial for manslaughter, before a jury impaneled and sworn, and witnesses have been examined, he has been put in jeopardy, and if the judge, without the consent of the respondent, discharge the jury without submitting the case to them, this is a bar to any further prosecution for the same act, and he cannot afterwards be tried on an indictment for murder for the same killing.

APPEAL from the District Court, twelfth judicial district, City and County of *San Francisco*.

The defendant was indicted on the 10th day of February, 1874, for murder, alleged to have been committed by killing Catharine Erni, at the city and county of San Francisco, on the 17th day of September, 1873.

The defendant, when arraigned, pleaded a former acquittal, former jeopardy, and not guilty. On the trial it was shown that on the 15th day of December, 1873, the defendant was arraigned in said court on an indictment charging him with the crime of manslaughter, committed by having killed the said Catharine, and pleaded not guilty. That, on the — day of January, 1874, he was placed upon his trial for manslaughter, before a jury duly impaneled and sworn, and that, after the witnesses for the prosecution and defense had been sworn and examined, the court, without the consent of the defendant, on motion of the district attorney, discharged the jury, and remanded the defendant to the custody of the sheriff, so that an indictment might be found for a higher crime. The indictment on which the judgment was rendered, from which this appeal was taken, was afterwards found. On the second trial, the defendant asked the court to instruct the



jury that if they found that the defendant had been formerly indicted for manslaughter committed by killing Catharine Erni, and had been placed on his trial before a jury duly impaneled and sworn, and that the court had discharged the jury without a verdict, without the consent of the defendant, in order that an indictment might be found against him for a higher crime, that they should acquit the defendant. The court refused to give the instruction.

Section one thousand one hundred and twelve of the Penal Code reads: "If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment, the court may direct the jury to be discharged, and all proceedings on the indictment to be suspended, and may order the defendant to be committed or continued on, or admitted to bail, to answer any indictment which may be found against him for the higher offense. If an indictment for the higher offense is found by the grand jury, impaneled within a year next thereafter, he must be tried thereon, and a plea of a former acquittal, to such last found indictment is not sustained by the fact of the discharge of the jury on the first indictment."

Section one thousand and twenty-one reads: "If the defendant was formally acquitted on the ground of variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, or in order to hold the defendant for a higher offense, without a judgment of acquittal, it is not an acquittal of the same offense." The motion of the district attorney to dismiss the jury was based on these sections. The defendant was convicted of manslaughter, and appealed.

*John H. Dickinson*, for the appellant, argued that sections one thousand one hundred and twelve, and one thousand and twenty-one of the Penal Code were in conflict with section eight, article one, of the constitution of this state; and cited *People v. Coleman*, 4 Cal., 46; *Ex parte Hoffman*, 44 id., 35; *People v. Howell*, 28 id., 460; *People v. Webb*, 38 id., 467; Cooley's Cons. Lim., 325; *People v. Cage*, 48 Cal, 323; *U. S. v. Keene*, 1 McLean, 431; 3 Co. Lit., 538; 1 Bish. Crim. Law, 1030 and 1040; Whart. Cr. Law, secs. 577 to 587; and *People v. Goodwin*, 18 Johns., 203.

*C. B. Darwin*, also for the appellant, argued that section one

thousand one hundred and twelve of the Penal Code should be so construed as to make the crime "of a higher degree" mean a crime of a different nature.

*T. P. Ryan*, for the people.

McKINSTRY, J. "No person shall be subject to be twice put in jeopardy for the same offense." Const., art. 1, sec. 8.

This language is more than the equivalent of "no person shall be twice tried for the same offense." 1 Bish. Cr. Law, 1018, 5th ed. A defendant is placed in apparent jeopardy when he is placed on trial before a competent court and a jury impaneled and sworn. His jeopardy is real, unless it shall subsequently appear that a verdict could never have been rendered by reason of the death or illness of the judge or a juryman, or that after due deliberation the jury could not agree, or by reason of some other like overruling necessity which compels their discharge without the consent of the defendant. *People v. Webb*, 38 Cal., 467, and cases there cited. And when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. 1 Bish. Cr. Law, 1206, 5th ed. Once in actual jeopardy, a defendant becomes entitled to a verdict which may constitute a bar to a new prosecution; and he cannot be deprived of his right to a verdict by *nolle prosequi* entered by the prosecuting officer, or by a discharge of the jury, and continuance of the cause. Cooley Const. Lim., 327.

A person cannot be twice in jeopardy for the same offense; but, in the cases to which we have referred, the happening of the subsequent event which renders the discharge of the jury necessary, shows that the defendant has never been in actual jeopardy.

In the case before us, however, it is not pretended that a verdict could not have been rendered at the first trial. The mere opinion of the district judge that the evidence showed the defendant to be guilty of a higher degree of crime, was not such a necessity as required the discharge of the jury, or authorized a retrial of the defendant for the same offense.

Judgment reversed and cause remanded, with direction to discharge the defendant.

RHODES, J., did not express an opinion.

## JONES vs. STATE.

(55 Ga., 625.)

PRACTICE: *Former jeopardy.*

The respondent was indicted for larceny, and while being tried, a *nolle prosequi* was entered on that indictment. He was then indicted for burglary on the same transaction, and to this indictment, pleaded his former jeopardy. *Held*, that the plea was good, and a bar to further prosecution.

JACKSON, J. The defendant was indicted for simple larceny, and put on trial. The indictment was *nol. prosequi* without his consent, on the ground that the day on which the offense was laid was an impossible one, being subsequent to the trial. He was then indicted for burglary in the same transaction, and pleaded his former jeopardy on the indictment for larceny. The court overruled the plea, and he was convicted of the burglary. A motion for a new trial was made on this ground, and other grounds disclosed in the record. That motion was refused by the court, and this refusal to grant the new trial is the error complained of.

In the view we take of the case, it is unnecessary to consider any ground of the motion, except the overruling this plea of former jeopardy.

1. The first question is, Was the indictment for larceny good, or was it bad, because an impossible day was laid? This is not an open question with us. It had been ruled before, and was ruled again at the last term, in the case of *Williams v. The State*. We there held the indictment good.

2. This indictment being good, the defendant was in jeopardy; his case had gone to the jury, and could not be withdrawn without his consent, at the option of the state, by entering a *nolle prosequi*. Such withdrawal was equivalent to an acquittal of the charge of simple larceny. *Reynolds v. The State*, 3 Ga., 53, 69; Code, sec. 4649.

3. His plea of former jeopardy alleges that the prosecution for burglary is on the same transaction, or for the same offense. The demurrer admits its truth. If true, he was about to be tried for the same offense, the same transaction, under a different name. It has been repeatedly held by this court that this cannot be done under our constitution. Code, sec. 5000; *Roberts*

and *Copenhagen v. The State*, 14 Ga., 8, 11, 12; *Copenhagen v. The State*, 15 id., 266; *Holt v. The State*, 38 id., 187, 189, 190; *Black v. The State*, 36 id., 447, 450; see, also, 1 Bish. Cr. L., 683, 688, 689; Hop. Ann. P. L., secs. 1574, 1575, 1577, *et seq.* We think, therefore, that upon authority, in our own state particularly, inasmuch as the plea alleged the same offense in the simple larceny charge as in the subsequent charge of burglary, and as the court struck out the plea on demurrer which admitted that the offense or transaction was the same, the court erred, and the new trial should have been granted on this ground in the motion.

*Judgment reversed.*

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REGINA vs. SMITH.

(34 U. C. Q. B., 140.)

INDICTMENT FOR MURDER: *Conviction for assault. 32-33 Vic., ch. 29, sec. 51.*

On an indictment for murder in the statutory form, not charging an assault, the prisoner, under 32-33 Vic., ch. 29, sec. 51, cannot be convicted of an assault, and his acquittal of the felony is therefore no bar to a subsequent indictment for the assault.

PER WILSON, J. In this case there could have been no conviction for the assault, because the evidence upon the trial for murder showed that it did not conduce to the death.

CASE reserved from the court of general sessions of the peace for the county of York, by John Boyd, Esq., junior judge of the county court.

The defendant was indicted for an assault on John Currie, occasioning actual bodily harm.

The defendant pleaded that at the assizes, holden at Toronto, in and for the county of York, he was "lawfully acquitted of the said offense charged in the indictment."

The crown traversed the plea, and the prisoner joined issue.

At the trial before the learned county judge, the record of an acquittal upon an indictment for the charge of murder was produced.

The indictment charged that one Lounsborough and the defendant "did feloniously, wilfully and of their malice aforethought, kill and murder one Thomas Currie." Nothing was

made, or desired to be made, of the difference in the name between John Currie in the assault indictment and Thomas in the murder indictment.

The following evidence was also given:

*John E. Kennedy* said: "I was a witness at the trial at the last assizes for the murder of Currie. The prisoner is the individual, Smith. I was one of the medical men who held a *post mortem* examination on the body of Currie. There was an abrasion across the bridge of the nose and under the right eye. I could not positively say what caused death; I could not say that death was or was not caused by external injuries. I stated at the trial (for murder), from the appearance, we were not satisfied that death was not caused by natural causes, accelerated by exposure."

*Dennis Hulbert* said: "I was a witness at the trial of Smith for murder; I knew Currie. The day of the death of Currie, I saw prisoner make a motion to hit Currie, but he was down; I saw Lounsbrough take him by the hair of the head and kick him; the prisoner struck at him, but I could not say whether he hit him or not. I gave the same evidence at the assizes; I did not think it was very serious. They were not long at him; I did not think they had beaten him badly."

The learned county judge directed a verdict for the crown upon the issue joined, which was rendered, and the case was reserved for the opinion of this court, the learned judge asking "Whether, on this statement of facts, and the questions of law arising therefrom, the defendant could have been lawfully indicted for assault on Currie after having been acquitted on the indictment for his murder; and whether my direction to enter a verdict for the crown on the above plea of *autrefois acquit* was right."

In this term, *M. C. Cameron*, Q. C., argued the case for the defendant.

The Consol. Stat. C., ch. 99, sec. 66, provides that, "on the trial of any person, \* \* for any felony whatever, where the crime charged includes an assault against the person, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warranted such finding." The act of 1869, 32-33 Vic., ch. 29, sec. 51, D., has, preceding the words, "the jury," in the section quoted, the words, "although

an assault be not charged in terms." The punishment, under the present act, may be for five years; the maximum under the former act was three years. In other respects the enactments are alike. The case of *Regina v. Ganes, et al.*, 22 C. P., 185, followed the decision of *Regina v. Bird*, 5 Cox C. C., 1; 2 Den. C. C., 94, and determined that on an indictment for murder, since the act of 1869 was passed, the person charged with the murder could not, on an acquittal of the felony, be convicted of an assault which did not conduce to the death of the person who was killed. The meaning of the enactment is, that the jury may convict of an assault if the evidence shows one to have been committed, however the indictment may be framed; that is, whether it charges an assault or not.

*McKenzie, Q. C., contra:* The evidence shows there was no homicide committed, independently of the acquittal itself. The medical testimony was: "We were not satisfied that death was not caused by natural causes accelerated by exposure." That being so, the defendant could not have been convicted of an assault upon the indictment for murder, according to the two cases which have been cited, because no such assault could have conduced to the death of Currie. The defendant was therefore rightly convicted of an assault at the general sessions of the peace. He was never before acquitted of that assault, because it was never charged upon or provable against him in respect of the prosecution for the murder. The imperial act, 24 & 25, Vic. ch. 95, repealed the corresponding provision in the English act, on which the question in the case of *Regina v. Bird* arose. In the act of 1869, ch. 20, sec. 19, murder and manslaughter are expressly excluded from the operation of that section, and this shows that they were in like manner excluded from the operation of 32-33, Vic., ch. 29, sec. 51, D.

RICHARDS, C. J. I have gone over carefully the case of *Regina v. Bird*, referred to on the argument. The report which I have of it is in 2 Den. C. C., 94. I think all the judges there concurred, that to convict of an assault, when the indictment is for felony, the indictment must be for a felony which necessarily includes an assault. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault.

The crime of rape, and cutting and wounding with intent, etc., are instances of the latter proposition; although there it is not unusual, and perhaps better, expressly to charge an assault in the indictment.

But in murder and manslaughter, it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The case of death by poison, or by criminal omission, are instances of this. See the judgment of Alderson, B., at p. 190.

The same learned judge at p. 126, in reply to an observation of counsel, that the words in the statute need not mean the crime averred on the face of the indictment, said: "No, it means such crime as in its nature includes an assault, even though that assault is not expressly averred in the indictment: Thus, manslaughter may or may not include an assault; a manslaughter by blows, etc., does so, and manslaughter by negligence, etc., does not. So administering poison with intent to murder does not necessarily include an assault; *Regina v. Draper*, 1 C. & K. 176, note a. It was for this reason that the judges in *Regina v. Bird*, 2 Den. C. C. 94, suggested that the indictment should expressly aver an assault in those cases to which the statute applied."

I understand that, in the opinion of all the judges in *Regina v. Bird*, unless the crime, as charged in the indictment, included an assault, there could be no conviction of an assault; and, in the argument, the inference was made and opinion expressed, that in those cases where the crime, such as rape, etc., did include an assault, it would be better to allege an assault.

The words added in our statute, "although an assault be not charged in terms," may be considered as a legislative declaration that it was not necessary in such cases to charge an assault, and therefore that it does not necessarily change the proper construction of the section from what it was before the amendment, as to the necessity of charging an assault in terms when the crime charged in the declaration does not necessarily include an assault.

Construing the section and amendment strictly in the light of the decided cases, I think we must hold that, when the indictment is for murder or manslaughter, the accused cannot be convicted of the assault, without an assault is charged in terms.

It must not be forgotten that in deciding this case, we must



look at it as if the defendant had been convicted of this assault when on the trial for the felony, in which event he would have been liable to a much more severe punishment than if convicted on an ordinary indictment charging an assault, as the one now before us is.

I think then, in this view, the defendant's plea fails, and the conviction in the session must be sustained.

As to the other question, though doubtless some of the eight judges who compose the majority in *Bird's Case* take the broad ground, that on an indictment for murder or manslaughter, the defendant cannot be convicted of an assault; for, if the assault contributed to the death of the person charged to have been murdered, the crime is either manslaughter or murder, or nothing else, I do not find that all the judges assented to that view.

Mr. Justice WIGHTMAN, who concurred with the majority of the judges, said, at p. 169: "If, in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the prisoners of felony, I should think that they might be convicted of assault under the statute, for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as felony in the indictment, and prosecuted as such, and though the evidence failed to establish it as a felony, it was the only transaction which was intended as felonious. If that was not felonious, there was no other."

Again, at p. 187, PATTISON, J., who concurred with the majority of the judges, said: "If, indeed, the very act or transaction which the crown prosecutes as a felony turns out by the evidence not to be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony and convicted of assault. And this may be the case even in murder or manslaughter, for it may happen that the prisoner has severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter, under such a supposition, yet it may turn out in

evidence that the deceased died from natural causes not occasioned, nor even aggravated or in any way affected, by the assault proved, and, in such a case, the prisoner might, I think, be convicted of an assault.

I think the doctrine here laid down might apply to the case before us, but it is not necessary to decide now whether the defendant might or might not have been convicted of the assault on an indictment properly framed, as we think this indictment was not so framed, and he could not have been convicted.

The broad ground taken by the judges who dissented from the conclusion arrived at by the majority in *Bird's Case* was, that the evidence offered on behalf of the crown in proving the assault was so offered to prove a felony; and, until the jury pronounced upon it and said the felony was not proved, the accused was in jeopardy as to the felony from the very assault so proved, and the jury having acquitted of the felony should have convicted of the assault, if the accused was guilty of it. If he was not guilty, then the general verdict of not guilty should free him from again being put on his trial for the offense which was proved before.

Of course, an assault six months before the death of the party and which had nothing to do with it, could not be brought in; but if the assault was just about the time of the death, and it was contended and attempted to be proved on behalf of the crown that it did occasion the death, but failing to prove that, then the case contemplated by the legislature was made out.

That seems to have been the general view of the dissenting judges in that case, and were it not otherwise decided, we might suppose it to have been the reasonable one.

As the clause of our statute now stands, considering the decisions that have been made on the subject in England, as well as in this country, it would seem to be of little value, and might as well be repealed.

In the American edition of 2 Den. C. C., at p. 127, note A., referring to *Regina v. Draper*, 1 C. & K., 176, it is said: "This seems to show that where the crime charged in the indictment may include an assault, but no assault is expressly or impliedly averred in the indictment, it will depend upon the nature of the crime, as ascertained by the evidence, whether it includes an assault or no, so as to come within 7 William IV., and Vic. ch. 85, § 11. It seems that the indictment *per se* would be an

insufficient test. Comp. *Regina v. Dilworth*, 2 M. & R., 531. "The case in C. & K. is opposed to *Regina v. Dilworth*, above referred to, and must be considered as overruled in *Bird's Case*.

MORRISON, J., concurred.

WILSON, J. This case may be considered in two aspects.

Firstly, as if the indictment for murder did charge an assault, by reason of the words, "although an assault be not charged in terms," and as if a conviction for assault could be made under it.

Secondly, as if the indictment did not charge or include an assault in any manner, by the effect of the statute or otherwise, and as if a conviction for assault could not be made under it.

In the first case, the evidence shows that the assault did not conduce to the death of Currie, and the conviction is right.

In the second case, whether the assault conduced to the death or not would be of no consequence, and the conviction is also right. That really disposes of the case.

In the case of *Regina v. Bird*, 5 Cox C. C., 1; 2 Den. C. C., 94, an assault was expressly charged in the indictment.

In *Regina v. Ganes*, 22 C. P., 185, I assume it was not; but that the statutory form "did feloniously, wilfully, and of his malice aforethought, kill and murder," was adopted.

Under the Consol. Stat. C., ch. 99, sec. 66, it was decided that the charge of murder in the words of the statute just given was not a crime charged which included an assault against the person, because murder was an offense which could be committed otherwise than by an assault.

It is said that the act of 1869, 32, 33, Vic., ch. 29, sec. 51, D., by the addition of the words, "although an assault be not charged in terms," has altered the meaning and operation of the statutory form of indictment, and that now an indictment for murder in the usual short form must, in every case, be read and construed as charging an assault, or as if it did charge an assault, and as warranting a jury to convict of an assault if the evidence sustain it, although they acquit of the felony.

It is not necessary to decide that point, for I think it does not necessarily arise here. I have no objection to express my opinion upon it, as it is a matter of the most serious importance.

I do not see that any argument can be derived from analogy, to help us, from the statutes authorizing a conviction in some

cases for an offense where a wholly different one is charged in the indictment, and there is an acquittal from that charge; as, for an attempt to commit an offense where the proof of the commission of the offense has failed, or for endeavoring to conceal the birth of a child, after an acquittal for the murder of it; or, for embezzlement, on an acquittal of larceny; or, for larceny, on an acquittal of embezzlement; and in other cases.

There would be nothing more incongruous, in permitting the conviction for an assault, if the evidence sustained it, upon an indictment for murder, when the principal offense failed, than there would in the other cases just mentioned.

The question must therefore be, What has the statute enacted?

It has declared that "where the crime charged includes an assault upon the person, although the assault be not charged in terms, the jury may acquit," etc.

In the indictment for murder, in the statutory form, does the crime charged (murder) include an assault? It does not. That is, "feloniously and of malice aforethought killing and murdering another," does not include an assault.

So far, then, the crime charged does not include an assault. If it do not, does the enactment apply to such a case? I think it does not. The "crime charged," I understand to mean, charged as appears by the indictment, and not charged as appears by the evidence. And if that crime include an assault, then the party may be convicted of the assault, although it be not charged in terms.

There are offenses which include an assault, notwithstanding the assault is not charged in terms, as rape, robbery, kidnapping, and stealing from the person. In all these cases the party, if acquitted of the principal charge, could be convicted of the minor offense with perfect propriety, because the minor is necessarily included in the greater crime charged.

In such a case there must have been an assault, although the assault be not stated in express terms to have been committed, if the principal offense were committed. And, if the principal offense were not committed, there may, nevertheless, consistently with the nature of the crime charged, have been an assault in fact.

I think that *Mr. McKenzie's* argument is entitled to great weight, that if, under 32-33 Vic., ch. 20, sec. 19, D., on a charge of murder or manslaughter, the jury were expressly precluded

from convicting one for unlawfully cutting, etc., why should they be required to convict of an assault?

It may be somewhat difficult to separate the assault, or the cutting, etc., from the murder or manslaughter, but I think it may be done.

The assault can be separated from the alleged rape, or robbery, for neither of these offenses might have been committed by the person charged, in which case the assault might well stand, although the principal offense failed.

It seems more difficult to make the separation when life has been taken, and the greater offense has been apparently committed. But life may be taken and no crime be committed, and yet there may be such a degree of culpability upon the person charged with the offense, that although he is not guilty of the crime, he is of an assault. I can conceive such a case.

In my opinion, the newly added words in the statute, although an assault be not charged in terms, make no other difference in the operation and construction of the clause, than to make it plainer or more emphatic than it was before.

These words have not enlarged and do not enlarge its operation. The section still applies to cases where the crime charged includes an assault, and to such cases only, and therefore not to an indictment for murder, framed as this one was upon the statutory model.

The conclusion I have come to is, that the conviction is right, because the assault in question did not conduce to the death of Currie. And it is of no consequence in that view how the indictment for murder was framed.

And I am of opinion, if it be material to determine, that the conviction is right because the defendant could not upon the indictment for murder, framed as it was, have been convicted of an assault.

The court, therefore, determines that the defendant was rightly convicted of the assault, and it is ordered that the judge of the county court, as judge or chairman of the general sessions of the peace for the county of York, or the junior judge of the county court, and as such junior judge, and being a judge of the general sessions of the peace, shall give judgment on the defendant upon the said conviction at the next general sessions of the peace for the county of York.

*Conviction affirmed.*

O'BRIAN *vs.* COMMONWEALTH.

(9 Bush, Ky., 333.)

*PRACTICE: Discharge of jury — Former jeopardy.*

The unnecessary discharge of one juror against the objection of the respondent, on trial for felony, is a discharge of the whole jury, and a bar to further prosecution of the indictment.

PRYOR, J. Murty O'Brian was indicted by a grand jury of the county of Hickman, on the 27th of March, 1872, for the murder of Tim. Hogan.

He appeared in answer to the charge, pleaded not guilty, and also filed a special plea, that of former jeopardy; the trial resulting in a verdict of guilty, and a judgment thereon sentencing him to be hanged. This appeal is from that judgment. The accused complains of many errors committed to his prejudice during the progress of the trial in the court below, the most of which are deemed merely technical, and we will therefore proceed to the consideration of the grave and important question involved in the case. It seems that the accused had been indicted for the same offense by a grand jury of the same county in the year 1868, and upon his appearing to answer the charge pleaded not guilty, and a jury was selected and sworn in accordance with the law, and the accused legally and regularly put upon his trial. Witnesses were introduced on the part of the commonwealth whose testimony conduced to connect the accused with the killing of Hogan, and while a witness was being examined by the prosecution one of the jurors (Spilman) announced from the jury box that he was a member of the grand jury that had found and returned into court the indictment upon which the prosecution was based; and thereupon the court, of its own motion and against the objections of the accused and his counsel, discharged this juror, and had another summoned in his stead. The trial then progressed, resulting in a verdict of guilty. The case was brought to this court and reversed, and upon its return to the lower court, the indictment having become mutilated, a new indictment was found, the same under which this conviction was had, and to which the special plea was filed, containing in substance, the facts above recited. These facts are all made to appear in the present record, the bill of evidence on the former trial

forming a part of the bill of evidence in this case. There is no controversy, however, between the attorney for the state and the counsel for the accused as to the existence of the facts constituting the defense relied on.

It is now insisted that the accused had the right to demand that the trial under the indictment found in 1868 should have progressed, and the court had no power, without his consent and against his objection, at its mere will, to discharge the jury, thereby preventing them from making a deliverance between him and the commonwealth; and he is for that reason entitled to an acquittal.

An instruction containing in substance this view of the case was offered by counsel for the defense and refused by the court, to which exceptions were properly taken, and the question now presented is, Should this instruction have been given to the jury? There is much diversity of opinion among judges as to the power of a court at its discretion to discharge a jury, during the progress of the trial, in a criminal case where the punishment is death. The ancient common law doctrine on this subject was to refuse to discharge the jury in such a case even with the consent of the prisoner; but this doctrine was discarded by many of the earlier English judges as unreasonable, and the jury permitted to be discharged in cases of absolute necessity.

Lord HALE said that if the prisoner after his plea and before trial becomes insane, he shall not be tried; and if after trial he becomes insane, he shall not receive judgment; and in a case where a juror fell down with a fit, it was held that the jury was properly discharged. 1 Hale, 34; 2 id., 295.

The discretionary power of courts over juries in capital cases has been greatly enlarged in many of the states of the Union, and in some it is held that while judges must be extremely cautious in interfering with the chances of life in favor of the prisoner, still in the exercise of their discretion they have the right to discharge the jury, and the only security the prisoner has is in the conscientious exercise of this power and the responsibility of the judges under their oaths. That courts have the power to discharge juries in criminal causes where the accused is even charged with a capital offense, and that without the prisoner's consent, is now too well settled to be doubted; but whether the exercise of this power is to be determined at the mere will of the



judge, or only in cases of absolute and extreme necessity, is a question in regard to which we find many conflicting authorities.

Section 211 of the criminal code provides that a challenge for implied bias may be taken where the juror was a member of the grand jury that found the indictment, but in no wise disqualifies him, unless challenged by the parties to the indictment. When the fact is disclosed showing this implied bias, if the accused fails to object or ask a discharge of the jury, it is a waiver of his right, and, as decided by this court in the case of *Fitzpatrick v. Norris*, he cannot afterward, for this cause, avoid the verdict or obtain a new trial.

The accused, however, in this case, after having once accepted the juror, was still willing to be tried by him, and protested against the action on the part of the court in discharging him, by excepting to the ruling; and the court, disregarding his objections, required the trial to progress after the substitution of another juror.

Section 248 of the criminal code provides "that if, after retirement, one of the jurors becomes so sick as to prevent a continuance of his duty, or other accident or cause occur preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree on a verdict, and it satisfactorily appears that there is no probability they can agree, the court may discharge the jury."

Section 249 provides "that in all cases where a jury is discharged, either in the progress of the trial or after the cause is submitted to them, the same may be again tried, at the same or another term of the court."

It could not have been intended by the section *supra* (248), that the power of the court to discharge a jury, in cases of necessity, is restricted to the causes enumerated in that section; if so, all other causes arising during the progress of the trial, showing a clear and manifest necessity for the discharge of the jury, must be disregarded. This section of the code, in our opinion, was not intended to define all the causes upon the happening of which this power could be exercised, but was only intended as an adoption of the legal rule that a case of actual necessity must exist before a jury can be discharged.

Section 249 was intended to apply to such cases as are mentioned in section 248, and has direct reference to the latter sec-

tion; but giving to section 249 of the code its most comprehensive meaning, and placing this right to discharge a jury by its provisions at the sole discretion of the judge, it is still argued that its exercise without any legal necessity is an infringement upon the constitutional rights of the citizen.

The accused had the right, under the constitution and laws of the state, to a fair and impartial trial of his case by a jury of twelve men, selected and sworn according to law, and when thus selected and chosen by him, it was their province to render and his right to demand a verdict as to his guilt or innocence of the offense charged.

The withdrawal of the juror Spilman, against his objection, terminated the legal existence of the jury sworn to try the issue between him and the commonwealth, a jury to whom he had been delivered in charge, and at whose hands he had the legal right to expect a safe deliverance. There was certainly no legal reason or necessity for discharging Spilman from the jury. He was a competent juror, although a member of the grand jury that returned the indictment into court. He had been accepted by both the commonwealth and the accused, and nothing but his death, sickness, or some accident preventing his continuance on duty, authorized the court, without the consent of the accused, to say that he should no longer constitute one of the panel. What the verdict of the jury might have been with Spilman upon it is left altogether to conjecture; yet the accused was entitled to a verdict from him in conjunction with his fellow-jurors, and the court had no legal power to deprive him of this right. Section 14 of article 13, state constitution, provides "that no person shall, for the same offense, be twice put in jeopardy of his life or limb."

A similar provision is also made part of the federal constitution, and that of almost every state in the Union. The right of trial by jury is of but little value to the citizen in a criminal prosecution against him, if this provision of the constitution can be violated and the accused left without remedy. If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is

this boasted right? It will not do to say to the accused that his only protection is in the sound discretion of the judge, or in the responsibilities assumed by him in taking the oath of office. As remarked by Justice TILGHMAN in the case of *The Commonwealth v. Cook*, 6 Serg. & Rawle, 577: "In the state of purity and independence in which I verily believe the judiciary of the several states, as well as of the United States, at present stands, there might be no danger of oppression from the enjoyment of a very large discretionary power as to the discharge of juries; but other times may come, in which judges may abuse this discretion," etc. GIBSON, Justice, in the case of *The Commonwealth v. Clue*, 3 Rawle, 488, said, "Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offense, I am at a loss to imagine. If discretion is to be called in, there can be no remedy for the abuse of it but in interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the constitution is guarded by sanctions more imperative. A right which depends on the will of the magistrate is essentially no right at all, and for this reason the common law abhors the exercise of a discretion in matters that may be subjected to fixed and definite rules."

While the integrity of the judiciary of this country has always been maintained, still we are satisfied the surest protection to the citizen when upon trial for a capital offense, upon such a state of facts as appears in this case, consists in the constitutional guaranty that he shall not be twice put in jeopardy of life or limb for the same offense. If the judge has the legal right to discharge the jury in a case like this, he may also discharge it on account of the absence of a witness for the prosecution, or in every instance, and as often as the testimony is deemed insufficient upon which to base a conviction, and subject the accused to the same mode of trial as pertains to every civil action.

It is, however, urged by the attorney for the state that the accused was not in jeopardy when the jury was discharged; and in order to have placed him in jeopardy so that he might be heard upon his special plea, there must be shown a verdict or judgment of acquittal upon a previous indictment for the same offense. If

the record must show a state of fact that would authorize the plea of *autrefois acquit* or *convict*, then it follows that the same character of evidence is required to bar a prosecution upon an indictment for murder that must be shown in a common law action determining the right of property, and the judge in either case is empowered to discharge the jury whenever in his opinion the ends of justice require it. Such certainly can not be the meaning attached to this provision in the bill of rights. The word jeopardy means exposure to death, loss, hazard, danger, peril, etc., and where one is put upon his trial on a charge of murder, before a jury sworn to decide the issue between the commonwealth and himself, the accused is then exposed to the hazard and peril of his life. In this case the accused was willing to risk the chances with the jury he had selected, but the court below compelled him to assume the additional peril of being tried by another and different jury; and as said by Chitty in his treatise on Criminal Law, "that to discharge a jury in a criminal case has one great inconvenience, that of bringing the prisoner's life twice in jeopardy; and in the case of the *Commonwealth v. Cook*, 6 Serg. & Rawle, 677, Justice DUNCAN says: "That when the jury are charged with a prisoner, where the offense is punishable by death, and the indictment is not defective, he is in jeopardy of his life, and the prisoner is entitled to say to the court, 'I have put myself on trial for life or death on these twelve men; I will not agree to be again put in jeopardy.'"

In the case of *Dobbins v. The State*, 14 Ohio St., 493, where the accused claimed an acquittal by reason of the discharge of the jury upon their failure to agree, Attorney General Critchfield for the state said: "It is well settled that the plaintiff in error was put in jeopardy by the first trial, if the court improperly discharged the jury. A verdict is not necessary either way to put a defendant in jeopardy, and being once jeopardized and not convicted, it is an acquittal; but it is also well settled that the court can exercise a discretion, and discharge a jury in case of absolute necessity, and where there is no reasonable hope of the jury agreeing on a verdict." And in the same case the learned judge, in delivering the opinion of the court, says, "It is perfectly well settled that if the state intervenes without a case of necessity, and prevents a verdict, the accused can not be subjected to a further trial consistently with the constitutional guaranty that he shall

not be twice put in jeopardy for the same offense;" and the following cases are cited: "*Hurley's Case*, 6 Ohio, 400; *Mount v. The State*, 14 id., 304; *Poage v. State*, 3 Ohio St., 229; *McKee's*, 1 Bail., 657; *People v. Goodwin*, 18 Johns., 205; *People v. Barrett*, 2 Caines, 304. "A person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged when they have been impaneled and sworn.

The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution, and he can not be deprived of this bar by the entering of a *nolle prosequi* against his will, or by a discharge of the jury and continuance of the case." Cool. by's Cons. Lim., 2d ed., 326.

In the case of the *State v. McKee*, 1 Bail. (S. C.), 657, O'NEALL, J., delivering the opinion, makes this inquiry: "We ask what is meant by jeopardy of his life? It is where one is put upon his trial upon a valid indictment for a capital offense. It may result in his condemnation, and hence he is in jeopardy.

After reviewing many authorities, the learned judge proceeds: "We are enabled to say that a jury, after they are charged, can be discharged, and the prisoner tried a second time for the following causes only: 1. The consent of the prisoner; 2. Illness of one of the jury, prisoner, or the court; 3. Absence of one of the jurymen; 4. The impossibility of agreeing on a verdict." While it must be maintained that some cause should intervene that of necessity compels the discharge of the jury, still we think it quite difficult to designate all the causes that would legally justify such action on the part of the court, and can only reaffirm the principle embodied in all the cases referred to, and which, in our opinion, is also the doctrine of the common law, that every interference on the part of the state, after the jury has charge of the prisoner, by which the accused is prevented from having a verdict declaring his guilt or innocence, unless upon facts clearly establishing a case of necessity, or showing the prisoner's consent, must operate as an acquittal, and this is the only mode of preserving and maintaining the constitutional provision on the subject.

In 3 Whart. Am. Crim. Law, § 3128, it is said, "an arbitrary

discharge of the jury without sufficient reason relieves the defendant from a second trial." And in the case of *Stewart v. The State*, 15 Ohio St., 155, a case similar in many respects to the one before us, the juror was a member of the grand jury that found the indictment, and after the trial had begun, so informed the court, when the judge inquired of the prisoner and his attorney if they objected to proceeding with the jury; the response was, they did, and thereupon the court discharged the jury and had another impaneled. The prisoner claimed that having been once in jeopardy, he was entitled to an acquittal, and upon an appeal, when this question was made, SCOTT, J., said: "At that stage of the proceeding (alluding to the announcement made by the juror) the accused had the right to demand such a disposition of the case either by verdict or otherwise as would bar another prosecution for the same crime; of this he could not be deprived at the will of the court by the entry of a *nolle prosequi* or the discharge of the jury without an absolute necessity therefor. Such action taken without his consent would operate as an acquittal, and be a bar to any further or subsequent prosecution for the same offense. To hold otherwise would be to contravene the constitutional guaranty against being twice put in jeopardy for the same offense."

An acquittal, however, was denied for the reason that the accused had objected to being tried by the juror. If in the present case the attorney for the state, after the introduction of the testimony for the prosecution, had by leave of the court entered a *nolle prosequi*, is there any doubt but that it would have resulted in the prisoner's acquittal? We think no jurist will assume that he could be again be tried for that offense, and if so, must not the discharge of the jury by the court under like circumstances have the same effect? It certainly would, and in either instance can be relied on as a complete bar to any subsequent prosecution for the same alleged crime.

It will be found upon a careful examination of all the authorities in conflict with the views here presented that the opinions have been delivered in almost every instance in cases of misdemeanors, where it is admitted the court, as in civil cases, can exercise a sound discretion in the discharge of the jury, but in cases involving the liberty of the accused, the judgments affirming the action of the lower court in discharging juries have been rendered

in cases showing an absolute necessity on the part of the court in ordering a new panel. There is no case to be found where the citizen has been placed upon trial for murder, and the jury discharged without his consent and without legal cause, where a doctrine contrary to the views herein expressed has been announced.

The opinion of Justice WASHINGTON, cited in 1 Whart. Am. Crim. Law, p. 580, although often quoted as sustaining the doctrine that the provision of the constitution in question does not apply to a jeopardy short of conviction, and that there is no difference between misdemeanors and capital cases in respect to the discretion of the court in discharging juries, contains this language: "By reprobating this plea (former jeopardy), we do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal."

This court, in the case of the *Commonwealth v. Olds*, who was proceeded against in the county court for failing to list a billiard table for taxation, in an opinion delivered in the year 1824, adjudged that nothing short of a final verdict or judgment could relieve a party from a second trial, and apply the argument as well to criminal proceedings as to misdemeanors; and when the present case was here by appeal in 1869, the court adopted the former case of *Olds* as a precedent, adhering to the principle therein stated. It is now insisted that the law of this case is settled by that opinion.

We are satisfied that nothing gives more strength to and confidence in the judiciary of the state than an adherence to well established principles affecting either the rights of person or property, and in a civil case we would not hesitate to decide that the former adjudication settled forever the rights of the parties.

In the present case, although the question seems to have been well considered in rendering the former opinion, still the court was only urged to its consideration by the persistency of counsel when there had been no plea presenting the question to the court below, or even a motion made to discharge the prisoner. The accused had no opportunity to present the special plea until the return of the cause and the finding of the present indictment; and with such a plea, sustained by the facts as they appeared on the former appeal, we are satisfied this court would not have affirmed the judgment had there been no other cause of reversal.



Conceding, however, that this question was properly before the court upon the former appeal, still no former adjudication gives to the state the right to take the life of the accused when he is entitled to an acquittal. The commonwealth is not in pursuit of victims, but desires to inflict punishment only in a legal and constitutional way upon the guilty.

The judgment of the court below is reversed; and as the verity of the record of the former trial is admitted by the state, the court below is directed to discharge Murty O'Brian from custody.

LINDSAY, J., not sitting.

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STATE vs. WILSON.

(50 Ind., 487.)

PRACTICE: *Discharge of jury in respondent's absence.*

On a trial for murder, the jury, after being out thirty-two hours, were discharged *in the absence of the respondent*, on account of their inability to agree. This, being specially pleaded on a second trial of the same indictment, was held a good plea and a bar to further prosecution.

BIDDLE, C. J. Robert Wilson, with John Cope, was indicted for murder. Wilson pleaded not guilty to the indictment, and was put upon trial by jury. The trial progressed, the evidence was introduced, the argument of counsel heard, and instructions of the court given. The jury retired to consider of their verdict, and, after deliberating thirty-two hours, were returned into court. They were interrogated by the court as to what the probability was of their agreeing upon a verdict, and they answered "there was none." Thereupon the court discharged the jury from the further consideration of the cause. The appellee afterwards specially pleaded the discharge of the jury in bar of the further prosecution of the case.

The plea set out the proceedings formally, and avers that such proceedings were then and there had in said case, that on the 20th day of November, 1874, the said jury, having been duly charged by the said court, at the hour of eleven o'clock and twenty-five minutes, A. M., of said last mentioned date, they retired, under the charge of a sworn bailiff of said court, to con-

sider of their verdict, and that said jury continued their deliberations till the hour of fifteen minutes before eight o'clock, P. M., of the 21st day of November, 1874, and having failed to agree upon their verdict, they, the said jury, were thereupon brought into court by their said bailiff by the order of said court, in the absence of this defendant, the said Robert Wilson, and while he was then confined and restrained in the jail of said county, and without his knowledge or consent, directly or indirectly; and the said court proceeded then and there to interrogate said jury upon the probability of their agreeing upon a verdict in said cause, and the said jury then and there informing the said court that there was no probability of their agreeing upon a verdict in said cause, the said court thereupon discharged the said jury from a further consideration of said cause, this defendant, the said Robert Wilson, not being then and there present, but being then confined and restrained in the jail of said county by the sheriff thereof, and without his knowledge or consent as aforesaid."

The state demurred to this plea for want of sufficient facts. The demurrer was overruled, and proper exceptions taken.

We are of opinion that the discharge of the jury, under the circumstances averred in the plea, would have been proper, if the appellee had been present in court, even though he had objected to the discharge, unless he had shown some good ground why the jury should not have been discharged; and in such case the discharge could not have been pleaded in bar of the further prosecution of the case. *McCorkle v. The State*, 14 Ind., 39; *The State v. Walker*, 26 id., 346; *Shaffer v. The State*, 27 id., 131; *The State v. Lennig*, 42 id., 541; and *Kingen v. The State*, 46 id., 132.

The more difficult question is: What was the effect of the enforced absence of the prisoner from the court at the time the jury was discharged?

It was the right of the prisoner to be present at the trial during all its stages. "No person prosecuted for any offense punishable by death, or by confinement in the state prison, or in the county jail, shall be tried, unless personally present during the trial." 2 G. & H., 412, sec. 94. How far a prisoner may waive this right, either expressly or by his voluntary absence, need not be discussed here, as the question is not in the case. By the averments in the plea, the prisoner waived no right, and could

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A verdict against the prisoner, under the circumstances, would have been erroneous, and some authorities hold such a verdict void. *State v. Hurlbut*, 1 Root, 90; *State v. Braunschweig*, 36 Mo., 397; *Price v. The State*, 2 Morris St. Cas., 1168; *Dunn v. The Commonwealth*, 6 Penn. St., 384; *Dougherty v. The Commonwealth*, 69 id., 286; *Sneed v. The State*, 5 Ark., 431. A verdict of acquittal, under the circumstances, would, of course, forever bar a further prosecution.

It remains for us to decide what ought to be the effect, where no verdict is rendered, and the jury is discharged, according to the facts alleged in the plea. We have been unable to find any decision or precedent to guide us in such a case. Mr. Wharton, in speaking of the presence of the prisoner at the reception of the verdict, says:

"In felonies such presence is essential; and cases have not been unknown where the courts have refused to permit this right to be waived. Thus a verdict of burglary was set aside in Pennsylvania, when it was taken in the defendant's absence, although his counsel waived his right to be present." Whart. Crim. Law, sec. 2999; *Prine v. The Commonwealth*, 18 Penn. St., 103; *Andrews v. The State*, 2 Sneed, 550; and *Jackson v. The Commonwealth*, 19 Grat., 656.

In the same section the author continues: "It is scarcely necessary to say that in cases where corporal punishment may be assigned, absence during rendition of the verdict, without waiver, vitiates the proceedings. And in fact this is exacted by the common law form, which requires the jury to look on the prisoner, and the prisoner to look on the jury, when the verdict is rendered. The better view is that in capital, if not in all felonies, the record must show that the defendant was present at trial, verdict and sentence."

It is held, too, and we believe it is the universal practice in all felonies, that the prisoner, after verdict and before sentence, shall be inquired of by the court if he has anything to offer why the judgment of the law should not be pronounced against him. And even at this stage of the case he may move in arrest of judgment, for want of sufficient certainty in the indictment as to person, time, place or offense; and if his objections be

valid, the whole proceedings shall be set aside. 4 Bl. Com., 375; 2 G. & H., 420, sec. 122. What the prisoner, in the case before us, if he had been present, might have offered to the court to show why the jury should not have been discharged, or whether anything, indeed, it is impossible for us to know; but we are unwilling to adopt a rule which would deny him the right to offer whatever was in his power. We think the facts stated in the plea constitute a sufficient bar to any further prosecution of the case, and that the court committed no error in overruling the demurrer. *The judgment is affirmed.*

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NOLAN vs. STATE.

(55 Ga., 521.)

PRACTICE: *Former jeopardy — Discharge of jury in respondent's absence.*

The respondent, having been tried for homicide, the jury, while the respondent was absent, confined in jail, returned a verdict of guilty of voluntary manslaughter. On motion of respondent the verdict was set aside. On being arraigned for a second trial, respondent pleaded specially his former jeopardy. *Held*, that the plea was good, and a bar to further prosecution.

When the defendant has been once legally put on trial, the jury sworn and evidence introduced, any unnecessary discharge of the jury without their having rendered a legal verdict, and without the respondent's consent, operates as an acquittal, and is a bar to a further prosecution for the same offense.

NOLAN was placed on trial for the offense of murder alleged to have been committed upon the person of Martin Grogan. Evidence was submitted to a jury regularly impaneled, argument had, and a charge delivered by the court. Subsequently, while the defendant was confined in jail, in the absence of his counsel, and without his consent, the jury returned a verdict finding him guilty of voluntary manslaughter, and were discharged. The defendant, at a subsequent term, moved that said verdict be set aside on the ground that it was rendered and published in his absence, and without his right of being present having been waived. The court ordered accordingly.

The defendant was subsequently arraigned a second time upon the same indictment, when he pleaded specially in bar the afore-

said facts as constituting his having been placed once in jeopardy, and claimed his discharge,

The plea was overruled by the court, and defendant excepted.

A verdict finding the defendant guilty of voluntary manslaughter was returned.

Error is assigned upon the above ground of exception.

*S. B. Adams, A. P. Adams*, for plaintiff in error.

*A. R. Lamar*, Solicitor General, by *Walter G. Charlton*, for the state.

BLECKLEY, J. One trial, and only one, for each crime, is a fundamental principle in criminal procedure, and must be the general rule practically administered in all free countries. For the public authority, whether king or commonwealth, to try the same person over and over again for the same offense would be rank tyranny. It would amount, in capital cases, to cruelty not unlike that of keeping a loaded repeater pointed at the prisoner's head, and, with deadly purpose but bad aim, discharging slowly one cartridge after another. Though some exceptions to the general rule are to be admitted, as when a new trial is had on the prisoner's motion, or when judgment upon a void indictment has been arrested, the transcendent importance of the rule itself requires that the exceptions should be few, and strictly guarded.

Where a first trial is complete, and its result, whether conviction or acquittal, left to stand, there is little or no room for any diversity of opinion on its sufficiency to bar a second. In such a case, the ordinary plea of former conviction, or of former acquittal is applicable, in terms, and would be upheld by all courts alike. But we reach debatable ground when we come to those cases in which trials have been begun but not ended, and some others, in which the endings have been ineffectual because irregular or wholly void. Courts are not fully agreed where jeopardy begins, or how far the defense of one in jeopardy differs, if at all, under our American constitutions, from that of *autrefois convict* or *autrefois acquit*, under the English common law. In the view of some judges, jeopardy arises, not out of the trial, but out of the verdict, as if, in a combat intended to be mortal, there is no danger of being slain until you are hit.

The former decisions of this court have tended always to treat a jury, when impaneled, sworn and charged with the case, as the

consecrated body of peers whose individual minds and personal consciences are laden with the prisoner's destiny. Not a jury, simply, but this jury, are to pronounce upon his guilt or innocence. They, and they alone, are to pass between the state and the prisoner, and arbitrate the grave matter in dispute. Their decision may or may not be final, as against the prisoner, but it will conclude the state forever, unless annulled at his instance. Though he may avoid it for any material error committed against him, the state cannot avoid it at all, but is bound by it irrevocably, so long as he suffers it to stand. He has a right to have it made up and legally returned into court, so that he may, if it suits him, accept it. A verdict on this trial and from this particular jury, not on some future trial before another jury, is what he may demand, and what the state, subject only to obstacles amounting to legal necessity, undertakes to afford. "What say you, gentlemen of the jury, am I guilty, or not guilty?" To this question he is entitled to an answer, if to obtain it be within the compass of legal possibility. He takes the risk of its being adverse, and may claim whatever chance there is of its being favorable. The fear of the situation is upon him, and he is entitled to its hopes, also. Condemnation or deliverance, here and now, is the one alternative. Only with his consent, or for some legal necessity, can the crisis be ended whilst the voice of his jury remain undeclared.

What amounts to such legal necessity as will justify the discharge of a jury without a verdict is a subject on which courts have widely differed. 5 Ind., 290; 8 id., 325; 14 id., 139; 16 id., 357; 26 id., 346, 366; 16 Ark., 568; 3 Ohio, 229; 14 id., 493. The tendency, of late, has been to lower the standard so as to comprehend moral as well as physical necessity, and in the region of the moral, to be content with very moderate tests. Mistrial, from inability of the jury to agree, is clearly within the principle. So, too, is the case of voluntary absence by the prisoner when he ought to be present; and, upon this theory, the cases in 2 Sneed, 550, and 7 Ala., 259, can be upheld. But we think no possible expansion of the rule can include the return of a verdict during the enforced absence of the accused by imprisonment, and the discharge of the jury as consequent thereupon. It is not quite clear, from the report, that the case in 2 Ala., 102, was one of that kind, for the cause of the prisoner's absence is

not expressly stated. His counsel were present, and made no request that he should be present. The supreme court, after ruling that judgment should be arrested, proceeded to the consideration of what further order should be made in the case, and the order made was, that the prisoner remain in custody to await a trial *de novo*. The facts were treated as in all respects like those in *The People v. Perkins*, 1 Wend., 91, in which latter case the prisoner was confined in jail when the verdict was received. No other authority is cited by the Alabama court, and we think *The People v. Perkins* is not a satisfactory authority upon the point now in question. The direct point for judgment in that case was, whether the prisoner could be sentenced upon a verdict received while he was confined in jail. It was held that he could not; and the court went on to advise that the verdict be set aside, and that there be a new trial. This advice, to be recognized as settled law in favor of the proposition that the prisoner was subject to a second trial, ought, at least, to be shown to have been followed by a second trial; but no such fact appears. If a second trial had taken place, and the plea of former jeopardy overruled, whether the reviewing court, in passing upon the plea, would have administered to the actual case, the substance of its own advice, as law, we do not know. In 16 La. An., 400, is a case of misdemeanor, on the line of trying the prisoner over whenever the first verdict is quashed. There the verdict was recorded in the French language, contrary to the statute which required it to be recorded in English on pain of absolute nullity. From a Georgia standpoint, the remedy for omitting to record the verdict in proper time and manner would be, not a second trial, but an entry on the record *nunc pro tunc*. In that case, however, the plea made no complaint of discharging the jury, but was simply a plea of former conviction, which was, of course, unsupported by a record in the French language, since, according to the statute, no verdict not recorded in English could be recognized.

In the case before us, the prisoner does not stand upon a former verdict, but upon former jeopardy. His complaint is, that his case was given to a jury and never legally withdrawn. What that jury thought of his guilt or innocence has not been authentically declared; and the jury, having been discharged in his enforced absence, and without his consent, their opinion of



his guilt or innocence can never be legally known. For aught that appears, every member of that jury was ready to acquit him. His defense before it may have been complete and triumphant. The error of receiving a formal verdict in the prisoner's absence would be nothing, if the jury had been retained in the box, and required to render a valid one in his presence. The mischief was done by discharging the jury without any legal necessity, and without obtaining from it something that the law could recognize as a verdict. The prisoner was once fully in the power of that jury, and he had a right to such a verdict as each several juror could avow before his face. Many years ago, in the county of Fayette, I witnessed the polling of a jury on the return of a verdict of guilty, where the eleven jurors first called declared the verdict to be theirs, and only the twelfth man disowned it. The result was, that on reconsidering the case, the whole twelve agreed to a verdict of not guilty, and the prisoner was acquitted.

The motion to set aside the verdict in the case at bar was made after the denial of a motion in arrest of judgment; see 53 Ga., 137; and the state contends that such a motion is equivalent to an application for a new trial. 30 Ga., 191. This is an effort to draw the prisoner into a second jeopardy as the price of escaping from the first. It is hard enough to pay the price where a new trial is actually moved for and granted. We think such a traffic in jeopardies is not to be considered as conducted by implication. The bill of rights declares that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial, after conviction, or in case of a mistrial." Code, sec. 5000.

*Judgment reversed.*

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MARTIN vs. STATE.

(51 Ga., 567.)

PRACTICE: *Recharging jury in absence of counsel for respondent.*

After the jury have been charged and retired, it is error for the court to recall and recharge the jury in the absence of the counsel for the respondent, without his consent. It is an infringement of the constitutional right of the respondent to have the privilege and benefit of counsel.

MARTIN was placed on trial for the offense of simple larceny.

He pleaded not guilty. The jury found to the contrary. He moved for a new trial upon the following, among other grounds:

"Because the court erred in recalling the jury from their room after they had been charged with the case, and after they had been out over two hours considering their verdict, and giving them a second charge in the absence of the defendant's counsel and without his consent, and by this second charge may have caused the conviction of the accused."

The presiding judge refused the ground aforesaid for the reason that he understood the solicitor general to say that counsel for the defendant had waived everything, or he would not have recalled and recharged the jury.

The solicitor general stated that when counsel for defendant was about to leave the court room while the jury were out, he understood him to say that he waived everything.

Counsel for defendant stated that he only waived the polling of the jury and the reception of the verdict in his absence.

The court required counsel for defendant to strike the aforesaid ground from the motion, to which the defendant excepted.

The motion for a new trial was overruled, and defendant excepted.

The judge certifies that counsel for defendant was absent from the court room at the time the jury was recharged without leave.

*Lyon & Irvin*, for plaintiff in error. *Charles J. Harrie*, Solicitor General, by *John Rutherford*, for the state.

TRIPPE, J. It is true the court required the prisoner's counsel to strike from his motion for a new trial, the ground that the jury were called back after they had retired, and were again charged by the court in the absence of defendant's counsel. But it still appears from the record that this was the fact, and the reason assigned for striking this ground was that the court understood the solicitor general to say, to wit: that counsel for defendant had waived everything. Counsel for defendant denied this, and stated what he did waive, which was "the polling of the jury and the reception of the verdict in his absence." There was then a misunderstanding between the counsel for the state and the defendant. Should that mistake or disagreement cause the forfeiture or loss to the defendant of his right to the benefit of counsel during one of the most important portions of his trial,

the charge of the court to the jury? The constitutional guaranty that "every person charged with an offense against the law shall have the privilege and benefit of counsel," should be strictly guarded and preserved. So deeply grafted in our practice has this great right become, that none are so low or so poor but that they may rely upon it. If it be so that they are unable to retain counsel, the courts will appoint counsel for them without charge to the defendant. The same duties and responsibilities rest upon counsel thus appointed as if they received the fullest pecuniary compensation. Nor does the fact that a defendant is thus represented lessen his right to have his counsel present at all stages of his trial.

It is said that under the rule we hold in this case, courts might be embarrassed in the administration of justice, that cases could not be conducted with certainty to a conclusion, if counsel for a prisoner could stop the trial by wilfully absenting himself from the court house. To this objection it may be replied, that courts are armed with plenary authority to enforce the discharge of duty on the part of all their officers; and besides, a fitting and proper penalty on derelict counsel in the case supposed, they could, in cases when the necessity arose, require the defendant to procure other counsel, or make the appointment for him. If the absence of counsel resulted from a cause which would be a good ground for continuance, and it would not be proper to substitute other counsel, it were better that there should be a continuance, or at least a temporary postponement, than that one not skilled in the law and who was largely ignorant of his legal rights, and perhaps totally ignorant of the practice on which those rights rested, should lose a privilege, the value of which cannot be estimated, and which, the organic law says, shall not be taken from him. So in this case, it would not probably have taken much time, possibly a few minutes to have secured the attendance of defendant's counsel, or had that been impossible, other counsel might have been chosen by the defendant or appointed by the court. An effort in that direction would have been proper. As this important privilege was lost to the defendant in this case, and at a critical stage of the trial, through a mistake of the state's counsel, at least it is positively so stated by defendant's counsel, doubtless the court was misled by it, we think that there should be a new trial. *Judgment reversed.*

## PEOPLE vs. LIGHTNER.

(49 Cal., 226.)

**PRACTICE:** *Discharging jury on Sunday — Verdict of assault with deadly weapon under indictment for assault with intent to murder.*

Asking time to plead is equivalent to pleading in waiving defects in the arraignment.

The court may adjudicate on Sunday that a jury cannot agree, and then discharge them.

Where it appears on the face of an indictment for assault with intent to murder that the assault charged was committed with a deadly weapon, the respondent may be found guilty of an assault with a deadly weapon.

**APPEAL from the County Court, County of Colusa.**

The indictment charged the defendant with having, on the 23d of October, 1873, assaulted one J. L. Gaudy with a knife, with intent him, the said Gaudy, to murder. On the 27th of October, 1873, the defendant was called for arraignment, his counsel being present. When called, he stood up, and the indictment with the indorsement thereon, including the names of the witnesses, was read to him by the clerk. He was then asked by the court if he was ready to plead, and answered that he was not, and asked for two days to plead, which time was given him by the court. The clerk did not give the defendant a copy of the indictment, but stated to the court that he had a copy in his office, to which he had not attached the seal of the court. The defendant made no objection to not then receiving a copy of the indictment. On the 29th, when the defendant was called on to plead, he refused to do so, and the court directed a plea of "not guilty" to be entered for him. The cause was called for trial at the January term. The jury retired to deliberate on their verdict about seven, P. M., Saturday evening. Sunday morning, about ten o'clock, they were brought into court, and, upon being interrogated, stated to the court that there was no likelihood of being able to agree.

The court, therefore, discharged the jury, and continued the cause for the term. At the April term, the defendant objected to setting the cause for trial, or taking any further proceedings in the same for the reason that the discharge of the jury at the former term operated as a release of the defendant, and because the cause had not been continued, nor any order made concern-

ing a retrial. The court overruled the objection. The cause was called for trial on the 13th of April, 1874. The defendant, on the trial, offered in evidence the minutes of the court on the former trial, for the purpose of showing that, by the irregularity of the discharge of the jury, and by the failure of the court to make an order continuing the cause, or for the retrial of the defendant, he was entitled to an acquittal. The court refused to receive the proposed evidence. The court sentenced the defendant for a felony, and he appealed.

The other facts are stated in the opinion.

*T. J. Hart* and *S. T. Kirk*, for the appellant, argued that there was in law no arraignment, and cited Penal Code, sec. 988, and no obligation to plead, and cited *People v. Corbett*, 28 Cal., 328, and that the subsequent trial was a nullity; that the court could not, on Sunday, make an adjudication that the jury could not agree; and that the court could not discharge the jury on Sunday, except when the act need not be preceded by a judicial determination that they could not agree, as when a verdict was found, and cited 1 Bish. Crim. Law, secs. 871-873. They also argued that, as the offense charged was defined by sec. 217 of the Penal Code, and the offense found was defined by sec. 245 of the Penal Code, that the verdict was good only for an assault; that where intent was one of the necessary ingredients of a crime, the state could not prove, nor could the jury find a different intent from the one laid in the indictment, and cited *People v. Keefner*, 18 Cal., 637; *Morman v. The State*, 24 Miss., 54; and 25 N. Y., 399.

*Love*, Attorney General, for the people, argued that the defendant waived the copy of the indictment, and that even if the order of continuance was void, still the court retained jurisdiction to try the cause at a subsequent term under sec. 1141 of the Penal Code.

**McKINSTRY, J.** As a general rule, a defendant may waive any statutory right or proceeding. It is true that where there has been neither arraignment nor plea, the court cannot supply an issue, even after verdict. But it has been suggested by this court that a plea will cure the defects of an arraignment, and it has never been decided that a formal arraignment can be waived only by plea. *People v. Corbett*, 28 Cal., 329. We entertain

no doubt that a prisoner may expressly waive all the formal steps and plead when called up for arraignment; and there can be no good reason why a defendant (present personally and by counsel) should not be held to have waived any detail of the proceedings which constitute the arraignment, when, as in this case, he asks for time to plead; which of itself admits the existence of the indictment and knowledge, or opportunities for acquiring knowledge, of its contents. He asks for time to plead, and obtains the delay on an implied stipulation that he will plead at the expiration of the time.

Under our system of practice, the common law continuances have no place, and in the case where a jury have failed to agree, and been discharged for that reason, the defendant may be tried again at the same or next term without any order of postponement. The power to discharge a jury on Sunday includes the power to adjudicate the fact that the jury cannot agree.

The indictment charges the defendant with an assault with intent to commit murder, committed "with a certain large knife." The verdict was to the effect, "Guilty of assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury without cause or excuse."

Defendant claims that this verdict was unauthorized, as the offense of which the defendant was found guilty is not included in that charged in the indictment.

The defendant was charged with an assault with a deadly weapon. If he was guilty of an assault with a deadly weapon, "without cause or excuse," the jury were justified in finding—as the court would have been justified in charging as a matter of law—that his intent was to do bodily harm. The crime of which the defendant was found guilty, therefore, was the crime for which he was indicted—less the specific intent to murder. *People v. Davidson*, 5 Cal., 133; *People v. English*, 30 id., 214; *State v. Robey*, 8 Nev., 312. In *People v. Murat*, 45 Cal., 284, this court said: "We are of opinion that under an indictment for an assault to commit murder, a conviction of an assault made with a deadly weapon, to do bodily harm, cannot be supported unless it sufficiently appears from the face of the indictment that the assault was made with a deadly weapon."

*Judgment and order affirmed.*

RHODES, J., did not express an opinion.

STATE *vs.* MADIGAN.

(48 Ind., 416.)

PRACTICE: *Dismissing valid indictment without cause.*

The power of entering a *nolle prosequi* belongs to the prosecuting officer who represents the government, and not to the court.

BIDDLE, J. The record in this case shows us that a good indictment, for unlawfully selling intoxicating liquor, was properly found against the appellee by the grand jury, by them regularly returned into court, and the case placed upon the docket for trial; and that "the court of its own motion, without arraighing the defendant, without hearing the testimony, and without reason given, dismissed the cause and discharged the defendant, and rendered the following judgment: "It is therefore considered by the court that said defendant, as to said indictment, go hence without day," to all of which the state by her prosecuting attorney properly excepted, and has appealed to this court.

In reviewing a proceeding so erroneous, so arbitrary, and so unjudicial as the one disclosed by this record, our duty is very plain.

The judgment is reversed; the cause is remanded, with directions to reinstate the case, and for further proceedings according to law.

NOTE. — The moral of this case may be made a little clearer by the following comical story, told by Lord Campbell: Chief Justice Holt having committed one of a brotherhood of swindlers who called themselves prophets, named John Atkins, to take his trial for seditious language, another of them, named Lacy, called at the Chief Justice's house in Bedford Row, and desired to see him. *Servant*: "My lord is unwell to-day, and cannot see company. *Lacy* (in a very solemn tone): "Acquaint your master that I must see him, for I bring a message to him from the Lord God." The Chief Justice, having ordered Lacy in and demanded his business, was thus addressed: "I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a *nolle prosequi* for John Atkins, his servant, whom thou hast sent to prison." *Holt, C. J.*: "Thou art a false prophet and a lying knave. If the Lord God had sent thee, it would have been to the Attorney General, for he knows that it belongeth not to the Chief Justice to grant a *nolle prosequi*; but I, as Chief Justice can grant a warrant to commit thee to bear him company." This was immediately done, and both prophets were convicted and punished. *Lives of the Chief Justices*, vol. 3, p. 59.



## REICH vs. STATE.

(53 Ga., 73.)

PRACTICE: *Alien grand juror — Oath to witness before grand jury — Autrefois convict.*

A special plea to an indictment that one of the jurors who found it was an alien is a good plea.

A special plea to an indictment that the witnesses on whose evidence it was found were not properly sworn, which does not name the witnesses or specify the oath they took is bad.

A special plea to an indictment of *autrefois convict* before a court which had no jurisdiction over the offense is bad.

REICH was presented for the offense of keeping open a tippling house on the Sabbath day. On arraignment he pleaded as follows:

1. That on September 9, 1873, he was taken before the mayor of the city of Columbus, charged with the same offense as is set out in the presentment, and convicted of the same; that said judgment remains in full force.

2. That A. Calman, one of the grand jurors who made the presentment, was not at that time a citizen of Georgia, but was then a subject of Great Britain.

3. That the witnesses upon whose testimony said presentment was found, were not sworn by or before the court; that if any oath was administered to them it was not an oath in these words: "The evidence you shall give the grand jury in this presentment, the State of Georgia against F. Reich, shall be the truth, the whole truth, and nothing but the truth, so help you God."

On demurrer, said pleas were stricken, and defendant excepted. He then pleaded guilty.

Error is assigned upon the above grounds of exception.

*H. L. Benaing, M. H. Blandford, C. R. Russell*, for plaintiff in error.

*W. A. Little*, Solicitor General, by *Peabody & Brannon*, for the state.

McCAY, J. 1. These pleas as to the oath of the grand jurymen are entirely too uncertain. They do not say what witnesses they refer to, nor do they point out in what the oath was defective. Pleas ought always to present matter on which issue may

be taken, and should contain such a statement as will notify the opposite party what he has to meet.

2. We think the plea that one of the grand jurors was not a citizen is a good plea. Section 3916 of the code clearly contemplates that a grand jurymen must be a citizen, and while the constitution does not, in terms, require it, and only uses the word "persons," yet there is nothing in this inconsistent with the code; and this has long been the law of this state. It was also the common law. 1 Chit. C. L., 307; 5 Bac. Abr., 312; 1 Bish. Crim. L., 795; 3d Co. Inst., 34; 9 Tex., 65; 5 Port. (Ala.), 484. So, too, we think the objection may be taken by special plea. There are some authorities seemingly to the effect that the challenge must be to the jury before bill filed; but it seems to us that this is unreasonable. How is a defendant to know that this secret inquest is proceeding to find a bill against him? Whatever objections there may be to a grand juror, that a party can make, ought (and this has always been the practice in this state) to be made at the trial, and before pleading to the merits. And such, we think, was the practice in England. 1 Chit. C. L., 307; Bac. Abr., Juries, (a.) 727.

3. The power to punish for selling without license does not, in our judgment, include the power to punish for keeping open doors on Sunday. This may be committed though the offender have license; and the offense may be committed without any selling at all. The crime or misdemeanor consists in the offense the act gives to good citizens, and the breach of the quiet and orderly customs of the day. It is a special offense, under the code, and the power to punish for it having been assumed by the state, it does not belong to the city. The trial for the offense before the city court was, therefore, illegal. The offense was a crime against the state, and not a mere breach of the city ordinances.

Judgment reversed on the ground as to the alien grand jurymen.

## PRINCE vs. STATE.

(44 Tex., 480.)

PRACTICE: *Cumulative sentences — Burglary — Effect of recent possession.*

Except by virtue of some statutory provision, every sentence must begin to run from its date, and its running cannot be postponed until the termination of a former sentence.

It is not error to refuse to charge that "possession of stolen goods, without other evidence of guilt, is not to be regarded as presumptive evidence of burglary," in a case where there was other evidence of guilt.

REEVES, J. The appellant complains that the court erred in the instructions given to the jury, and for refusing to give the instructions asked by appellant. Appellant asked two charges; one of them was given and the other was refused, and in place of it another charge was given by the court, as stated in the bill of exceptions. The charge asked and refused was, in substance, that possession of stolen goods, without other evidence of guilt, is not to be regarded as presumptive evidence of burglary.

The court charged the jury, in substance, that if the defendant was found in possession of property which was stolen from the house, and his possession was recently after the theft, and that he failed to give a reasonable account of his possession, they might take these circumstances into consideration, with all other facts and circumstances in evidence, to enable them to determine whether the defendant was guilty or not of the offense with which he was charged. The instructions, taken as a whole, are as favorable to the defendant as he had any right to expect, in view of the evidence in the case.

It is further assigned for error that the court erred in overruling the defendant's motion for a new trial. The ground of the motion for a new trial, in addition to the grounds already noticed, is that the verdict of the jury is contrary to the law and the evidence. Without discussing this assignment, we think the evidence fully supports the verdict of guilty, as found by the jury.

It is further assigned for error that the sentence of the court is erroneous, in that it is cumulative, and to be carried into effect in the future. The character and force of this objection will

more fully appear from the following entry in the judgment of the court: "It further appearing to this court that at this term of the court the said defendant, Anderson Prince, has been tried and convicted of the offense of theft from a house, under indictment No. 1522, on the docket of Victoria county, and for which he has been sentenced to be imprisoned in the state penitentiary for a term of two years, it is ordered by the court that at the expiration of the last said term of imprisonment, and in case the judgment in this case, No. 1521, shall be affirmed by the supreme court of Texas, to which the defendant has appealed, then the sentence in this cause, after the execution of the sentence in cause No. 1522, shall be carried into execution."

Courts of the highest authority have differed on the question as to whether one term of imprisonment was to commence on the termination of the punishment on another charge, or whether the term should commence from the judgment and sentence of conviction and run concurrently. The former is maintained in the states of Connecticut, Pennsylvania, Massachusetts and California, and perhaps other states. *State v. Smith*, 5 Day, 175; *Mills v. The Commonwealth*, 13 Pa. St., 631; *Kite v. The Commonwealth*, 11 Met. (Mass.), 581; *The People v. Forbes*, 22 Cal., 135.

On the contrary, it was held by the supreme court of Indiana, in the case of *Miller, Warden of the State Prison v. Allen*, 11 Ind., 389, that, in the absence of a statutory provision authorizing it to be done, the court had no power to order a term of imprisonment in the penitentiary to commence at a future period of time.

The revised statutes of New York, as cited by the supreme court of California, in the case of the *People v. Forbes*, 22 Cal., 135, provide that in case of two or more convictions, before sentence on either, the term of imprisonment upon the second or subsequent conviction shall commence at the termination of the previous term of imprisonment. The criminal code of Kentucky contains substantially the same provision. Before the Kentucky code was adopted, the court of appeals of that state held that the court had no power, independently of a statute, to make one term of imprisonment commence at the expiration of another. *James v. Ward, Keeper of the State Penitentiary*, 2 Met. (Ky.), 271.

The court, referring to cases at common law, where the pris-

oner was sentenced to several terms of imprisonment, one to commence after the conclusion of the others, said: "but it may be remarked that in all these cases the punishment by imprisonment was, by law, at the discretion of the court. The time that the prisoner was to be confined was not determined by the jury, but upon his being found guilty of the offense contained in the indictment, his punishment was discretionary with the court, and the term of his imprisonment was fixed by it. The court, having the power to prescribe the length of time the imprisonment was to continue, might sentence the prisoner to several terms of imprisonment in succession, where he was charged with several offenses, because it could inflict the same amount of punishment upon him in each case separately," referring to the case of *Ree v. Wilkes*, 4 Bur., 325.

We think the correct rule was enunciated by the courts of Indiana and Kentucky in the cases referred to. The criminal code of Texas makes no provisions authorizing the court to accumulate the terms of imprisonment in cases like the present.

It is not shown that there was any connection between the theft as charged in the indictment No. 1522, and the burglary as charged in indictment No. 1521. The code provides that the jury shall assess the punishment in all cases where it is not fixed by law. The judgment and sentence of the court have reference to the punishment as assessed by the jury, and the prisoner is conveyed to the penitentiary immediately after final sentence to undergo his punishment.

We are of opinion that the court erred in directing that the sentence in this case should be carried into execution after the expiration of the terms of imprisonment in case No. 1522. This entry will not require a reversal of the judgment, but it may be reformed and corrected by supreme court as provided by article 3208, Paschal's Dig. It is therefore ordered that the entry of the judgment in this case be so reformed and corrected as that the period of imprisonment, to wit: two years, as fixed by the jury, shall commence from the judgment and sentence of conviction in this case, and not from the expiration of the term of imprisonment in case No. 1522, as ordered by the district court in the entry of the judgment. The judgment is reformed and corrected accordingly.

*Reformed and corrected.*

NOTE.—In the case of *Mills v. Com.*, 13 Pa. St., 631, the question of the power of the court to impose sentence of imprisonment to begin on the expiration of a prior term of imprisonment was not raised by counsel or discussed by the court. But such a sentence having been passed and the prior judgment having been reversed, the supreme court modified the sentence so as to make the term of imprisonment begin to run from the expiration of yet another term of imprisonment to which the prisoner had been previously sentenced. But this was done without any discussion as to the power of the court to pass cumulative sentences.

In *State v. Smith*, 5 Day (Conn.), 175, the prisoner was twice convicted at the same term of passing counterfeit notes on two different indictments. On the second conviction, sentence was passed directing the term of imprisonment to begin on the expiration of the term of imprisonment to which he had been sentenced on the first conviction. It was urged on behalf of the prisoner that this mode of accumulating the terms of imprisonment was "novel, without precedent, cruel and illegal." The supreme court, however, held that the practice was legal and proper and in accordance with the usage of the courts in Connecticut for many years. No authorities are cited by the court, and EDMUNDS, J., dissented. In *Kite v. Com.*, 11 Met., 581, where the prisoner had been sentenced to imprisonment for four years, to take effect from and after the expiration of three former sentences, the three former judgments having been reversed, it was objected that the judgment was erroneous and void, because there were not three former sentences, legal and valid, and therefore no fixed time for the punishment on this sentence to begin.

The court say: "The court are all of opinion that it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates. It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions. Though uncertain at the time, depending on a possible contingency, that the imprisonment on the former sentence will be remitted or shortened, it will be made certain by the event. If the previous sentence is shortened by a reversal of the judgment or a pardon, it then expires, and then by its terms the sentence in question takes effect, as if the previous one had expired by lapse of time. Nor will it make any difference, that the previous judgment is reversed for error. It is voidable only, and not void; and, until reversed by a judgment, it is to be deemed of full force and effect; and though erroneous and subsequently reversed on error, it is quite sufficient to fix the term at which another sentence shall take effect. *Judgment affirmed.* No authorities were cited in this case to this point.

In the case of *People v. Forbes*, 22 Cal., 136, the opinion of the court is reported as follows:

NORRIS, J., delivered the opinion of the court. COPE, C. J. and CROCKER, J. concurring:

The defendant is held in custody by virtue of five separate sentences passed upon him on the sixth day of September, 1862, by the recorder's court of the city and county of San Francisco. One adjudges that he be imprisoned for ninety days. Each of the others adjudges that he be imprisoned for the period of ninety days, "said term to commence at the expiration of previous sentences." Having been imprisoned more than ninety days, he claims now to be discharged upon the ground that the sentences to commence at the expiration of previous sentences are void, for not fixing any definite time for the commencement of the imprisonment.

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As a general rule, a judgment should be certain and definite, and complete in itself, so that what it requires to be done may be known without resort to any thing outside the record, yet it seems to have been a common practice in criminal courts to enter judgments of imprisonment to commence at the expiration of sentences in other cases. *King v. Wilkes*, 4 Burr., 325; *Commonwealth v. Leaths*, 1 Virg. Cases, 151; *State v. Smith*, 5 Day, 175; *Russell v. Commonwealth*, 7 Serg. & Rawle, 489; *Brown v. Commonwealth*, 4 Rawle, 259.

In the case of *Brown v. Commonwealth*, the sentence was that the defendant's imprisonment should begin "immediately after the expiration of the sentence passed upon him for the larceny of the goods of Hiram Jones." The judgment for the larceny of the goods of Hiram Jones was reversed on appeal, and it was claimed that the other judgment thereby became a nullity. But it was decided that the judgment in the one case being in force until it was reversed, the expiration of the sentence occurred upon its reversal, and that the second imprisonment began from that time. In that case, therefore, a sentence was held valid which was not only indefinite on its face, and could only be made definite by resorting to the record in another case, but in which the time of commencement of the sentence was changed by an occurrence happening in the other case after the sentence had been pronounced.

It is further objected in the case before us, that the subsequent sentences do not refer to any other particular sentence, and are thus not only indefinite themselves but do not point to any certain means by which they may be made definite, or by which the time of the commencement of the imprisonment can be ascertained. We have not found any case in which the sentence was in the general language used in this case, to wit: "Said term to commence at the expiration of previous sentences." In the state of New York it is provided by statute, that in case of two or more convictions before sentence on either, the term of imprisonment upon the second or subsequent conviction shall commence at the termination of the previous term of imprisonment. 2 Rev. Stat. N. Y., 700. In regard to this provision, the revisers say it is "generally declared in the sentence, but as it may be omitted, it is deemed useful to provide for it by law." It would seem that under this statute, in that state, if, in the case of two or more convictions, the sentence should be in terms simply for a specified time of imprisonment, saying nothing as to the time of its commencement or as to any former conviction, the term of the second imprisonment would commence at the termination of the first. The effect of this is that under a commitment on such a second judgment the officer would justify the imprisonment of the defendant by showing that the term of imprisonment did not commence at the date of the judgment or commitment, in consequence of the existence of a prior judgment, but which was not mentioned in the second. We have no statute of exactly the same import in our state, but we may deduce the inference from the enactment of such a statute in New York, upon the recommendation of a commission of eminent and experienced jurists, that it is not an anomaly in criminal proceedings that the time of commencement of a term of imprisonment should depend upon the existence of other judgments not specified, and to be ascertained only by referring to the records of the court. If a judgment is valid, as in the case of *Brown v. Commonwealth*, above cited, which requires an examination of the records of the court in another specified case to fix the commencement of the term of imprisonment, we can see no reason why a judgment should not be valid in which the commencement of the term of impris-



onment is to be fixed by ascertaining by reference to the records of the court the termination of the terms of imprisonment of any prior sentences that may have been imposed upon the same defendant.

We do not think the question is affected by the circumstance that the sentences in this case were pronounced by a court created by statute, and of limited and inferior jurisdiction. The statute creating the court does not, we believe, prescribe what shall be the form of its judgments in this particular. The court may render its judgments in cases within its jurisdiction in the usual form of judgments of criminal courts under similar circumstances.

The case is not clear of embarrassment, but we think the judgment may be sustained under the settled practice in analogous cases.

The prisoner must, therefore, be remanded.

In *Miller v. Allen*, 11 Ind., 389, it appeared that Allen had been sentenced on the 12th of November, 1856, on two several charges, to two years imprisonment on each, and that the second term of imprisonment should commence at the expiration of the first. Allen having served two years was discharged on *habeas corpus*, and the order discharging him was taken by the warden of the prison (against whom the writ of *habeas corpus* ran) by appeal to the supreme court. The court say:

"We are of opinion that the order discharging the petitioner was correct.

"In the absence of any statutory provision authorizing it to be done, the courts have no authority to order a term of imprisonment in the penitentiary to commence at a future period of time; and the order to that effect may be regarded as a nullity. The judgment would then stand as an ordinary judgment, to be carried into effect as in other cases.

"In the revision of 1843, there was a provision, that when any person is convicted of two or more offenses at the same term of any court, the imprisonment to which such person shall be sentenced on any second or subsequent conviction, shall commence at the expiration of the preceding term of his or her imprisonment. Rev. Stat., 1843, p. 997, § 72. But there is no such provision in the code of 1852.

"The case resolves itself into this: The petitioner was sentenced to imprisonment in the state prison for two years, on each of several indictments. He has been two years in the state prison, and while he has served out the time fixed by the one sentence, he has undergone the full penalty inflicted by the other. There being no statute in force providing that one term of imprisonment shall commence at the expiration of another, we are of opinion that both terms commence and run concurrently.

"We have been furnished with no authority on the question involved, and in the absence of authority to the contrary, it seems to us that the discharge of the petitioner was correct for the reasons above indicated.

"Per CURIAM: The order made below is affirmed with costs."

*James v. Ward*, 2 Metc. (Ky.), 271, was an action of false imprisonment brought by James against Ward, the keeper of the state penitentiary. It appeared that James had been convicted, at the same term, of two separate felonies, and his punishment assessed by the jury in each case at five years imprisonment. The judgment was in these words:

"It is considered by the court that the prisoner be confined in the jail and penitentiary house of this commonwealth to hard labor, for the space of five years on each indictment." The action was for continuing the imprisonment beyond five

years. The court, after examining the English case which had been cited (*Re v. Wilkes*, 4 Burr., 325), and pointing out that this case was not in point, because the aggregate imprisonment imposed in that case did not exceed what the court had power to impose on one of the convictions singly, decide that under the judgment, there was no authority to imprison the plaintiff for more than five years.

The court say: "In this case, the extent of the confinement had to be assessed by the jury, within the periods prescribed by law as the punishment for the offense, and the court could only render a judgment in conformity with the verdict. The statute regulating the punishment of offenses by confinement in the penitentiary evidently contemplated that the confinement should commence immediately after the judgment, and the court had no power, prior to the late change in the law, to postpone its commencement until the expiration of a previous period of confinement. Where a person was convicted a second time of a felony, the punishment of which was confinement in the penitentiary, the court had the power to sentence him to be confined for double the time of the first conviction. Judgment, in such cases, could not, however, be given for the more usual penalty, unless the fact of the former conviction was found by the jury, and in such cases, the time of confinement was merely prolonged, but its commencement was not postponed until a future period.

"Whatever, therefore, may have been the intention of the court in rendering a judgment that the prisoner should be confined for the space of five years upon each indictment, the legal effect of the judgment is, that he shall be confined only for five years; that such confinement shall be upon each indictment, and that both terms of five years shall commence and terminate at the same periods. \* \* \* As there was no statute in force in this state, at the time the judgment against the prisoner was rendered, providing that, in such cases, one term of imprisonment should commence at the expiration of the other, the judgment must be construed as sentencing the prisoner to five years' imprisonment only, and having served five years in the penitentiary, he has undergone the punishment to which he was sentenced, both the terms having commenced and ended simultaneously."

On the whole, the question of the power of the courts to impose cumulative sentences on successive convictions rests in doubt, on American authority. A number of the state legislatures have authorized them by statute. Such is the case in New York, in Kentucky, in Missouri, and some other states. The fact of the passing of such a statute would be some indication of a legislative judgment that without the statute, the power did not exist. It seems to be well settled in England that the power to pass cumulative sentences exists at common law. In some of the states it is held that there are no common law crimes, nor is there any common law power of administering criminal justice; that all the power the courts have in criminal matters is statutory, and the common law can only be resorted to as affording analogies, light in interpretation of words, statutes, etc., and as authority, perhaps, in matters of procedure. In other states, and according to Mr. Bishop, in a majority of the states, it is held that the common law exists as a source of power and jurisdiction in the administration of criminal justice, and that what may be punished as a crime at common law, may be punished there to the same extent, unless the law has been changed by statute. In those states where it is held that the common law is not in force for the purpose of punishing crime, it would naturally be held that the power of inflicting cumulative sentences does not exist except where conferred by statute. There

is another matter in this connection which is worthy of consideration. In most, if not in all of the states, it is provided by statute that if a prisoner is convicted of three or more larcenies, or three or more acts of receiving stolen goods, at the same term of court, he shall be punished by imprisonment for ten or fifteen years, and in some cases, perhaps more. Now if there exists, independently of such a statute, a power in the court to impose cumulative sentences, the statute is unnecessary, as the cumulative sentences which might be imposed would equal, and in many cases exceed, the aggravated punishment allowed by the statute. The provision for this aggravated sentence is really and in effect a provision for cumulative sentences, in these specified cases. On the whole, it would seem to be the better doctrine that there is no power to pass cumulative sentences in the absence of a special statutory authority, although the great authority of Mr. Bishop supports the opposite opinion.

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WEAVER *vs.* PEOPLE.

(33 Mich., 296.)

PRACTICE: *Suspended sentence — Sentence by a judge who did not try the cause.*

Where upon a plea of guilty to a charge of malicious injury to a dwelling, sentence has been suspended until the next term, and the prisoner allowed to go on his own recognizance in a merely nominal sum, and the subsequent term has passed without any further steps being taken, it is not competent for another judge holding the court temporarily to impose a severe sentence upon the respondent; such action is to be considered not merely assupplying the trial judge's omissions, but as practically overruling his decision.

ERROR to *Van Buren* Circuit.

*W. Scott Beebe*, for plaintiff in error, cited Comp. L., §§ 4951, 7997; 20 How. Pr., 118; 20 Wis., 61; 1 Chitty Cr. L., 696-9, 701-4; 2 Hale P. C., 404-5.

*Andrew J. Smith*, Attorney General, for the people.

CAMPBELL, J. Weaver, on the 8th day of July, 1874, pleaded guilty to a charge of malicious injury to a dwelling. The case was pending in the circuit court for the county of Van Buren, and the plea was put in before the Hon. J. W. STONE, circuit judge. On the same day Judge STONE suspended sentence until the first day of the next term, which was the first Monday of October, 1874, the respondent being allowed to give his own recognizance to appear at that day, in the sum of one hundred dollars. The sentence was not further suspended, nor the recognizance forfeited, and defendant was not called up for sentence at the return term, but continued at liberty.

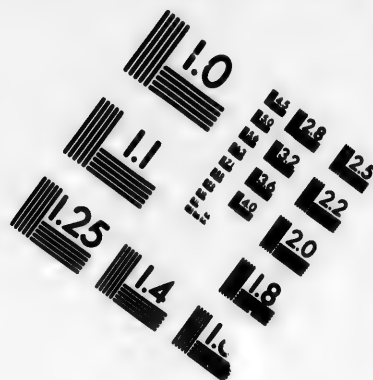
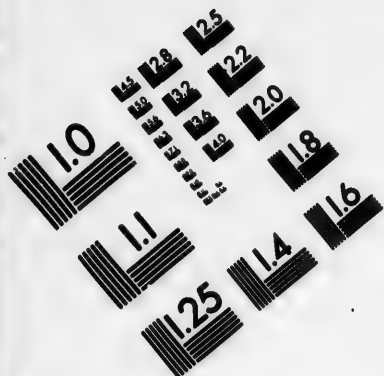
On the 25th day of October, 1875, Judge TENNANT, a judge of another circuit sitting temporarily, sentenced Weaver to two years and six months imprisonment in the state prison. On this, error is brought.

It is not necessary in this case to discuss the power of a different judge to give sentence where it has been omitted, and where it does not appear that such omission was designed to interfere with punishment. There has been some dispute as to the best course to pursue under such circumstances. Lord HALE, not considering the abstract question, said it was not his custom to give such sentences in cases of felony. But generally the question seems to become important in view of some action or expression of the trial judge indicating his sentiments. It is said with much force, that inasmuch as there can be no sentence without the joint belief of the jury in the prisoner's guilt, and of the judge in the deserts of the offender, where he has any discretion to exercise, the views of the judge are to be respected.

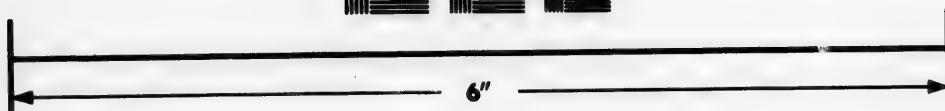
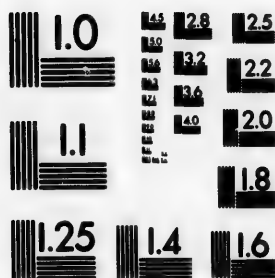
In the present case there was no fixed penalty. It might be imprisonment in the state prison, or it might be a short imprisonment in the county jail, or a fine not exceeding five hundred dollars, but with no minimum amount required to be imposed. In other words, it was recognized by the legislature that such offenses might be of trifling enormity, and not worthy of serious notice.

Sentences may be suspended for various purposes. It may be for the purpose of allowing steps to be taken for a new trial, or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognizance and without sureties, in a merely nominal amount, signifies usually the latter purpose. It at least is a plain assertion of the judge that he did not regard the offense as one that should receive a serious punishment. The failure to take steps during the October term of 1874 was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands, it is fairly to be inferred it was intentional. To sentence a prisoner to the penitentiary under such circumstances, and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, and the sentence was unauthorized, and the judgment must be reversed, and the prisoner discharged.

The other justices concurred.



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## STATE vs. GRAY.

(37 N. J., 368.)

PRACTICE: *Erroneous sentence.*

Where a prisoner, who is confined under an illegal sentence, is brought before the court on *habeas corpus*, he must be discharged, and the court has no power to correct the sentence or to remand the prisoner to the trial court to be sentenced afresh.

*ON habeas corpus.*

Argued at November term, 1874, before Justices VAN SYCKEL and WOODHULL.

The defendant was convicted of adultery in the special sessions of Essex county, and sentenced on the 4th of September, 1874, to imprisonment at hard labor, in the state prison, for the term of six months. He was brought by *habeas corpus* before this court, and motion made for his discharge from custody, because the judgment was illegal.

*S. Kalisch*, for the defendant.

VAN SYCKEL, J. Section 16 of the act for the punishment of crimes (Nix. Dig., 195) provides that every person convicted of adultery shall be punished by fine not exceeding \$100, or by imprisonment not exceeding the term of six months. In every section of this act, prior to the 16th, the crime denounced is declared to be punishable by imprisonment at hard labor.

The omission of these words in the 16th, 20th and 21st sections, while they are found in the sections which precede and follow them, could not have been unintentional. Adultery was not indictable at common law, being punishable only in the ecclesiastical courts, and therefore the legality of the judgment by which the defendant was incarcerated in this case must rest wholly on the provisions of the 16th section of our act concerning crimes. That section authorizes imprisonment only and the words "hard labor" cannot be added to it without enlarging the language of the statute, and increasing the measure and severity of the punishment. The act for the government and regulation of the state prison (Nix. Dig., 901), which is in *pari materia*, provides that every person sentenced to hard labor and imprisonment under the laws of this state for any time not less



than six months, shall be delivered to the keeper of the state prison, but no warrant is given for the confinement therein of any one who may not be sentenced to imprisonment at hard labor.

In my opinion, the only sentence which can be imposed under the 16th section is the specified fine or imprisonment, and that under such judgment the defendant could not lawfully be committed to the state prison.

The question which chiefly occupied the consideration of the court in this case is, whether we could pronounce the proper judgment here, or send the prisoner to the court below to be re-sentenced according to law.

In *Ree v. Ellis*, 5 Barn. & Cress., 395, the court below adjudged that the defendant be transported for fourteen years. In error to the King's Bench, Lord TENTERDEN held that seven years' transportation was the extreme limit of the punishment, and that the judgment being erroneous, it could not be sent back to be amended. In this case it was suggested that the judgment of the inferior court might be regarded as a good judgment for transportation for seven years, treating it as void as to the excess, but Lord TENTERDEN, after taking time for consideration, decided this point against the crown.

In the later case of *The King v. Bourne*, 7 Ad. & Ellis, 58, Lord DENMAN, Justices LITLEDALE and PATTERSON concurring, refused, when an improper judgment was given below, to pronounce such judgment as should have been given, or to remit the case to the court below for judgment, on the ground that they had no such power. This was undoubtedly the English rule, until otherwise regulated by statute, and it has been generally recognized as authority in this country.

In *Shepherd v. Commonwealth*, 2 Mete., 419, where the judgment below was erroneous, Chief Justice SHAW cited the English cases, and held that he could not render a new judgment, or send the case to the court below for judgment.

The judgment was, therefore, simply reversed, and the prisoner discharged, as had been done in the English cases. *Stevens v. Commonwealth*, 4 Mete., 360; *Christian v. Commonwealth*, 5 id., 530.

To remedy this defect a statute was passed in Massachusetts, in 1851, authorizing the superior court either to pass judgment

in due form, or to remand the case for that purpose to the inferior jurisdiction. *Jacquins v. Commonwealth*, 9 Cush., 279.

In *Daniels v. Commonwealth*, 7 Barr., 375, the Pennsylvania court admitted the rule of the English cases to be as I have stated it, and put its power, to modify the judgment of the court below, upon their statute of June 16, 1836.

In *The People v. Taylor*, 3 Denio, 91, Chief Justice BRONSON, upon the authority of the English and Massachusetts cases, declared that if a wrong judgment be given against a defendant, which is reversed on error, the court of review can neither give a new judgment against him, nor send the case back to the court below for a proper judgment.

In *Shepherd v. The People*, 25 N. Y., 406, and *Ratzky v. The People*, 29 id., 132, the court of appeals cited the case in Denio with approbation, and held that it was only by force of their subsequent statute, passed in 1836, that the rule was changed.

Many other cases which support this doctrine are referred to by Justice CLIFFORD, in *Ex parte Lange*, 18 Wall., 184, with the remarks "that they were decided in appellate tribunals, and in jurisdictions where there was no legislative act conferring any authority to impose the proper sentence, or to remand the prisoner to the court of original jurisdiction for that purpose, and, of course the only judgment which the appellate court could render was that of reversal, which operated to discharge the prisoner."

In this state there is no positive law regulating this subject, nor has this question, as far as I am informed, been discussed in our courts, and I, therefore, would feel constrained to follow the almost unbroken current of decision by judges of eminent ability, if the precise point determined in those cases was now under consideration.

The writ of *habeas corpus* in this case does not bring up the record of the proceedings and judgment below for review; it operates on the body of the defendant, and raises the single question, whether he is legally in custody.

This court may, as has been done in this case, award a *certiorari* to produce the record for its inspection, but it has no power to reverse the judgment of the inferior jurisdiction; it can simply declare that by virtue of the sentence, if manifestly illegal, the defendant cannot be longer restrained of his liberty. The court which rendered the judgment cannot vacate it, or render a new

judgment after the term at which it was pronounced is ended, or the judgment is executed, and the punishment partly borne.

The judgment subsisting, but, being illegal and void, it is no warrant for retaining the defendant in custody, and it seems clear that no new judgment can be passed in this court or the court below.

In accordance with these views, the defendant was discharged from custody at the last term of this court.

WOODHULL, J., concurred.

NOTE. — Of late years, the question has been frequently discussed in the courts whether a person confined in prison under sentence of imprisonment, on a conviction for crime, may resort to a writ of *habeas corpus* to obtain his liberty, where it appears, on inspection of the whole record, that the court which imposed the sentence, exceeded its authority, or had no jurisdiction to impose that particular sentence in that case.

In January, 1875, application was made to the supreme court of the state of Michigan for a writ of *habeas corpus* on behalf of William T. Underwood. Underwood was then confined in states prison on a sentence passed by the recorder's court of Detroit, under a statute which was claimed to be unconstitutional and void. The court, in a *per curiam* opinion, held, that "the question sought to be raised would necessarily involve a review of the order of the recorder's court, by virtue of which the prisoner is confined; and that *habeas corpus* is not the proper remedy; and that the question must be raised by writ of error, or other appropriate remedy. Writ denied." This is all there is of the opinion, and no authorities are cited or referred to. *Matter of Underwood*, 30 Mich., 502.

In the celebrated Tweed case, in June, 1875, the question was elaborately discussed by the court of appeals of New York. Tweed was sentenced on an indictment, on twelve different counts, to one year's imprisonment and \$250 fine on each count, in addition to fines imposed on other counts on which he was convicted on the same indictment. The maximum punishment fixed by law for the offense, of which a different one was charged in each count of the indictment, was one year's imprisonment and \$250 fine. The judgment provided that the term of imprisonment on each count should begin on the termination of the imprisonment imposed on the next preceding count, thus making the terms of imprisonment cumulative, and aggregating twelve years from the date of the judgment. Tweed paid one fine of \$250, and after remaining in prison one year, sued out a writ of *habeas corpus* to regain his liberty. Two questions are discussed in the case. First, whether the court had any power to impose cumulative sentences on a conviction on a number of counts for misdemeanor in the same indictment; and, secondly, whether, if it be determined the court had no power to impose more than the maximum sentence allowed by law on a conviction on one count, *habeas corpus* is a proper remedy. The court first considered the question as to whether the writ of *habeas corpus* was a proper remedy on a sentence of imprisonment in excess of the authority of the court. After a very full review of the authorities, the court considered that *habeas corpus* was a proper remedy, concluding their opinion on that point in these words: "I see no escape from the conclusion that the jurisdiction of the court of oyer and terminer, to give the judgment or judg-

ments which appear upon the record returned to this court, and by virtue of which the relator is held, was a proper subject of inquiry upon the return of the writ of *habeas corpus*. It was the only fact which the prisoner could allege; for whatever errors the court may have committed prior to the judgment, if the court had power to make the judgment, they can only be reviewed by writ of error. In other words, upon the writ of *habeas corpus*, the court could not go behind the judgment; but, upon the whole record, the question was whether the judgment was warranted by law, and within the jurisdiction of the court.

"This conclusion, as to the potency and efficiency of the writ of *habeas corpus* to test the jurisdiction of every court in the land, assuming by its judgments, decrees and process to deprive the citizen of his liberty, and which is entirely consistent with the history, uses and sacredness of the writ, and its connection with civil liberty and free government, makes it necessary to consider the questions made upon the record, of the convictions and judgments returned to us. Our examination will be confined to that record. We shall not assume to go back of it for any purpose, for by it must the jurisdiction, as challenged, be tried. Bearing in mind the distinction between judgments merely informal or erroneous, and those void as without jurisdiction, *coram non iudice*, the question is, had the court of oyer and terminer the power to pronounce the several judgments, and inflict the accumulated punishments, upon the conviction of the prisoner of the offenses, as charged in the single indictment?"

On the other branch of the case, the court reached the conclusion that the court had no power to impose more than one fine of \$250 and one year's imprisonment and Tweed was accordingly discharged. Being a case of very great public interest, in which the most eminent counsel of the New York bar was engaged, the greatest research, learning and ability were displayed in the case. All the authorities will be found collected in it. A full report of the case will be found in 60 N. Y., 559.

In October, 1873, the supreme court of the United States passed upon this question in *Ex parte Lange*, 18 Wa. 163; S. C., 2 Green Crim. Rep., 103.

The petitioner Lange had been convicted in the U. S. circuit court for the southern district of New York of embezzling certain mail bags. For this offense the law prescribes imprisonment for not more than one year, or a fine of not more than two hundred dollars, or less than ten. The judge imposed a sentence of one year's imprisonment and a fine of two hundred dollars. Lange paid the fine which was duly paid over to the United States treasury. Five days after the defendant's commitment under the first judgment he was brought before the court and an order entered vacating the first sentence, and the defendant was again sentenced to one year's imprisonment from that date. Lange petitioned the supreme court for writs of *habeas corpus* and *certiorari*, which were allowed. The return of the marshal showed that he held Lange in custody by virtue of the latter judgment. The main question discussed by the court is, the authority of the circuit court to award the second sentence, and it was held that it had no such authority, and the sentence was illegal and void. The question of the right of the supreme court to examine into the matter on *habeas corpus* was dismissed by the court in these words:

"The authority of this court in such case, under the constitution of the United States and the fourteenth section of the judiciary act of 1789, to issue this writ and to examine the proceedings in the inferior court so far as may be necessary to ascertain whether the court has exceeded its authority, is no longer open to ques-

tion. The cases cited at the end of this paragraph, will, when examined, establish this proposition as far as judicial decision can establish it. *United States v. Hamilton*, 3 Dall., 17; *Burford's Case*, 3 Cranch, 448; *Ex parte Bollman*, 4 id., 75; *Ex parte Watkins*, 3 Pet., 193; *S. C.*, 7 Pet., 568; *Ex parte Metzger*, 5 How., 307; *Ex parte Milligan*, 4 Wall., 2; *Ex parte McCordle*, 6 id., 318; *S. C.*, 7 id., 506; *Ex parte Yerger*, 8 id., 85.

"Disclaiming any assertion of a general power of review over the judgments of the inferior courts in criminal cases, by the use of the writ of *habeas corpus*, or otherwise, we proceed to examine the record of the case in the circuit court, and the return of the marshal, in whose custody the prisoner is found, to ascertain whether they show that the court below had any power to render the judgment by which the prisoner is held."

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BRIESWICK vs. MAYOR, ETC., OF BRUNSWICK.

(51 Ga., 639.)

PRACTICE: *Imprisonment in default of fine — Constitutional law.*

Power to punish by fine or imprisonment does not include power to imprison in default of payment of a fine.

A statute validating all ordinances of a city held obnoxious to a constitutional provision that no statute should embrace more than one subject matter.

WARNER, J. It appears from the record and bill of exceptions in this case, that Robert Brieswick and Cyrus Shelton, two boys under fourteen years of age, were imprisoned in the guard-house of the city of Brunswick; that they were brought before the judge of the superior court on a writ of *habeas corpus*, on the allegation in their petition therefor, that their imprisonment was illegal. The court, after examining into the cause of their capture and detention, on the return of the *habeas corpus*, discharged them from the custody of the officer who had them in charge. They were again arrested and imprisoned in the guard-house of said city, and again brought before the judge of the superior court on a second writ of *habeas corpus*, on the return of which, it appeared by the answer of the guard-house keeper, that he detained them in custody by virtue of a warrant of commitment issued by the mayor of said city, dated the 4th of June, 1873; the order of discharge for the same alleged offense being dated 23d of May, 1873. The warrant of commitment recited that the defendants had been found guilty on the 23d day of May, 1873, of violating an ordinance of the city "to prevent persons from indecently exposing themselves or others," and sen-

tenced to pay a fine of \$5.00, or in default thereof, to be confined in the guard-house ten days; and each having failed and refused to pay said fine, respectively; and whereas, the said Shelton and Brieswick have been confined by you in said guard-house for the space of three days; these are, therefore, to command you to secure the bodies of the said Shelton and Brieswick, and keep them, and each of them, in the guard-house seven days from the date of their reception. There does not appear to have been any warrant issued for their arrest, founded on the affidavit of any person, but simply a notice served upon them, signed by the city marshal, requiring them to appear before the police court, stating that they were charged with the offense of "bathing at a wharf known as the Cotton Press." On hearing the second *habes corpus*, the court refused to discharge them, and remanded them to be imprisoned, whereupon the defendants excepted.

In view of the facts disclosed by the record in this case, it may well be doubted whether the two boys who were arrested and imprisoned were not deprived of their liberty without due process of law. See Code, sections 4714, 4715, 4723, 4724, 4725. There was no affidavit made by any person charging them with having violated any ordinance of the city prior to their arrest and detention. They were simply notified to appear before the police court as being charged with "bathing at the wharf known as the Cotton Press." They were charged with and imprisoned for having committed the offense jointly, whereas the offense was not joint, but several as to each one of them. The warrant of commitment recites that they were found guilty of violating an ordinance of the city "to prevent persons from indecently exposing themselves or others." The first section of the ordinance of the city, number eighty-five, prohibits any person from wilfully making any indecent or public exposure of his or her person, or of any other person. The second section of said ordinance prohibits any person from swimming or bathing in the river opposite the city, at any place below south of the mouth of the canal, between daylight in the morning and eight o'clock in the evening, except in bath houses or in bath dresses. These two sections recognize two distinct offenses, to wit, wilfully making an indecent or public exposure of the person, swimming or bathing at certain described points, except in bath houses or in bath dresses. For which offense were the boys imprisoned?

The notice states that they were charged with the offense of "bathing at the wharf known as the Cotton Press." The mayor's warrant of commitment recites that they were found guilty of violating the ordinance which prohibited an indecent exposure of themselves. The mayor's warrant of commitment also recites that the boys had been found guilty of that offense, and sentenced to pay a fine of \$5.00, or, in default thereof, to be confined in the guard-house ten days; that appears to have been the judgment of the court, but the mayor further recites that as they had been confined three days in the guard-house, they were to be imprisoned only seven days. Under what judgment of any court did the mayor derive his authority to imprison the boys for seven days? The judgment of the court under which he pretended to act was that they should be imprisoned ten days, and that was the only judgment under which he had any pretense of authority to imprison them at all. The three days' imprisonment, for which he undertook to give them credit, was declared by the judge of the superior court to have been illegal.

1. But we place our judgment in this case on the ground that the imprisonment of the boys was illegal, because the police court of the city of Brunswick had no power or authority conferred upon it by its charter to coerce the payment of the fine imposed by imprisonment.

The act of 27th August, 1872, consolidating and amending the several acts incorporating the city of Brunswick, provides by the 38th section thereof, that the police court shall have cognizance of all offenses against the ordinances, by-laws, rules and regulations of said city, and the laws of this state touching said city, with power to inflict the proper punishment by fines, imprisonment, labor, or other penalty prescribed by such ordinances, by-laws, rules and regulations, from time to time, and to enforce the same by mittimus, directed to the chief marshal of the city, or any lawful constable thereof, or to the keeper of the guard house, when necessary. The police court of the city, under its charter, had the power and authority to have inflicted punishment by imposing the fine prescribed by the ordinance for its violation, but did not have the power and authority to coerce the payment of such fine by the imprisonment of the party or parties on whom such fine was imposed. The city council have the power, under its charter, to prescribe the punishment for a vio-



lation of the ordinances of the city, either by fine or by imprisonment. When the punishment inflicted is imprisonment, that is the penalty to be enforced. When the penalty is a fine, that is the penalty to be enforced in the manner provided by law; but the charter does not confer upon the city council of Brunswick the power and authority to pass an ordinance to enforce the collection of a fine by imprisoning the party who fails to pay it, until he shall do so, or for any specified number of days until he shall do so. The city council have the power and authority to pass an ordinance inflicting the proper punishment by imprisonment for a violation of its ordinances, but have not the power and authority, under its charter, to pass an ordinance to enforce the collection of a fine by imprisonment, or to imprison any person for the non-payment of a fine imposed on him.

2. The 58th section of the act does not help the matter. By the 4th section of the 3d article, paragraph 5 of the constitution of 1868, it is declared: "Nor shall any law or ordinance pass which refers to more than one subject matter, or contains matter different from what is expressed in the title thereof." The only subject matter referred to in the title of the act is, "to consolidate and amend the several acts incorporating the city of Brunswick, and for other purposes therein mentioned."

The other subject matter contained in the act is to make valid and confirm "all the acts and ordinances of the mayor and city council of the city of Brunswick, heretofore passed, and not in conflict with the constitution of the state of Georgia or of the United States," whether these acts and ordinances had been authorized by, or were in conformity with, the laws of this state or not. The 58th section of the act, it will be perceived, introduces into the body of it a distinct and quite comprehensive subject matter, embracing all the ordinances of the city which had theretofore been passed. Did the general assembly understand when the act to consolidate and amend the several acts incorporating the city of Brunswick was passed, that the other subject matter embraced in it, of confirming and making valid all the acts and ordinances of the mayor and city council of Brunswick, was also made a part of that law? Did the general assembly have before it these ordinances which were confirmed and made valid by that act? Did it know and understand what were the several provisions of these ordinances? It was just such legislation as this

that the constitution intended to prohibit, when it excluded more than one subject matter from being embraced in the same law. It was intended to prevent surprise, deception and fraud, by covertly inserting into the act a distinct subject matter, not referred to in the caption of the act.

Inasmuch as it appears on the face of the record that the two boys were imprisoned because they did not pay the fine of \$5 imposed on them respectively, their imprisonment was illegal, and the court erred in not discharging them.

Let the judgment of the court below be reversed.

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LARK vs. STATE.

(55 Ga., 435.)

HABEAS CORPUS: *Practice.*

A writ of error to an order refusing a discharge on *habeas corpus* will not be dismissed, because when the argument is reached, the term of imprisonment which is set up in the return to the writ of *habeas corpus* has expired. Presuming the imprisonment to be at an end, because the sentence has expired, would be to take for granted the validity of the sentence which is the very matter in question.

BLECKLEY, J. The relator, plaintiff in error, was sentenced for simple larceny by the county court of Richmond, in July, 1874. The terms of the sentence were, "to work in the chain-gang on the streets of Augusta, for twelve months." He sued out a writ of *habeas corpus* in April, 1875, on the ground that his detention was under this sentence, and that the same was illegal. The return to the writ set up the sentence as legal warrant and authority. The judge below refused a discharge, and on that refusal a writ of error was prosecuted to this court, and filed here in May, 1875.

1. On the call of the case for argument, in the present month of November, the defendant in error moved to dismiss it, because the sentence had expired by its own limitation. The motion was overruled. It did not appear from the record, or otherwise, that the imprisonment had ceased. It could not be presumed to have ceased, without deciding on the question made by the writ of error, namely, the legality of the sentence. An

illegal imprisonment is not to be supposed to terminate in a voluntary discharge. It is the duty of judicial tribunals, when administering the remedy of *habeas corpus*, to see that it is made effectual by proper legal instrumentality, and to take nothing for granted. Those who imprison another by virtue of an illegal judgment might not scruple to protract the imprisonment indefinitely. Besides, even if the relator were now at liberty, and if this fact appeared to the court by proper evidence, there might be reason for proceeding with this writ of error to settle, by a final judgment, the legal relation between him and those who detained him, at the time the writ of *habeas corpus* issued. Future proceedings might depend upon such a judgment. But this is a mere suggestion; we place the refusal to dismiss the writ of error upon the ground that to presume the imprisonment to be at an end, because the sentence has expired, would be to take for granted the validity of the sentence, which is the very matter in question.

[The remainder of the opinion is not considered of general importance. REP.]

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TILTON *vs.* STATE.

(52 Ga., 478.)

PRACTICE: *Polling jury.*

In a criminal case the respondent has a legal right to poll the jury at the proper time, and it is not in the discretionary power of the court to refuse it. The proper time to poll the jury is after the verdict has been announced.

CHATHAM Superior Court. May term, 1874. Before Judge BARTLETT.

Tilton was placed on trial for the offense of an assault and battery. He pleaded not guilty. The jury found to the contrary. After the verdict had been read, but before it had been recorded, in the presence of the jury, the defendant moved that they be polled. The motion was overruled upon the ground that it came too late. The defendant moved for a new trial on account of error in this decision. The motion was overruled, and the defendant excepted.

*A. B. Smith*, for plaintiff in error.

*Albert R. Lamar*, Solicitor General, for the state.

McCAY, J. 1. In the case of *Malone v. The State*, 49 Ga., 211, this court held, that the proper time to ask for leave to poll the jury was after the verdict was read, and we adhere to that ruling. How is the prisoner to know whether he desires to poll them until he knows what the verdict is? It may be in his favor. The English practice was for the foreman to render the verdict *via voce*. How could a jurymen answer until the foreman had spoken? The court refused to permit the jury to be polled because the demand came too late. This was error. But, it is said, the leave to poll rests in the discretion of the court. It might be enough to say, that in this case the judge did not exercise his discretion, and that the prisoner has not, in fact, had even the opinion of the court that it was not wise to permit him to poll the jury. Had the judge not thought the time gone by, maybe he would have allowed it.

2. But we are of the opinion that in criminal cases the privilege of polling a jury is a legal right in the defendant, and does not depend on the discretion of the court. In an experience of thirty years at the bar, I have never known it denied to a prisoner demanding it, and my brethren, one of whom has an experience of nearly fifty years, say the same. And this seems to be the settled rule. 1 Wend., 91; 18 John., 187; 2 Ala., 102; 2 Hale, P. C., 299, 300.

The cases in this court, where the privilege has been said to depend on the discretion of the court, were all civil cases, and the court has distinctly confined the ruling to civil cases. 6 Ga., 464; 22 id., 431; 41 id., 465; 31 id., 661.

*Judgment reversed.*

## WARD vs. PEOPLE.

(30 Mich., 116.)

### *Waive of jury in misdemeanor — Constitutional law.*

On the trial of a criminal complaint for an assault and battery, before a justice of the peace, a defendant may waive his right to a jury, where he expressly so elects, and if he does so, a trial without a jury is not a violation of his constitutional rights.

ERROR to *Kent Circuit*.

*O. H. Look*, for plaintiff in error. *Isaac Marston*, Attorney General, for the people.

CHRISTIANCY, J. The only question in this case is, when a defendant brought before a justice of the peace upon a criminal complaint for a simple assault and battery, triable by a justice court, under chapter 94 of the Revised Statutes of 1846 (Comp. L. of 1871, ch. 179), having pleaded not guilty, and being asked by the justice if he wished a trial by a jury, declares that he does not, and submits to a trial without calling for a jury, whether, under our constitution, a trial by the justice without a jury is valid, or whether it must be regarded as a violation of the defendant's constitutional rights.

The statute in question (sec. 6, ch. 179, Comp. L. of 1871) not only provides that he may be tried by the justice, under such circumstances, but that the justice may proceed to try the issue and determine the case, "if no jury be demanded."

The constitution (art. 6, sec. 18) provides that justices of the peace "shall have such criminal jurisdiction, and perform such duties as shall be prescribed by the legislature." But the section upon which the plaintiff in error relies is section 27 of the same article, which is in these words: "The trial by jury shall remain; but shall be deemed to be waived in all civil cases, unless demanded by one of the parties, in such manner as shall be prescribed by law."

It is very clear that this section, in its application to criminal cases, does not authorize any implied waiver of a jury from the silence of a defendant, or his mere failure to demand a jury, and in my opinion, though the point does not arise here, in a criminal case, where, under our humane system of administering criminal law, nothing is to be inferred against a prisoner for his standing mute; he cannot properly be regarded as having waived a jury, a trial by which is generally esteemed a privilege, by merely failing to demand it, notwithstanding the statute cited so provides. But upon this point, as it is not necessarily involved, my brethren express no opinion. But it is further insisted by the plaintiff in error, that the provisions of section 27, article 8 of the constitution, above cited, expressly providing that the right of trial by jury shall be deemed to be waived in civil cases, unless demanded, etc., involves an implied prohibition against any waiver of trial by jury in a criminal cause. But while I think it may be regarded as an implied prohibition against having the mere failure of the defendant to demand a jury trial

treated as a waiver of such trial, I do not think there is anything in the provision which prevents the defendant from expressly electing whether he will have a jury trial or be tried by the court without a jury.

The law secures to him the right of being tried in either way, as he may prefer, and though a trial by jury might generally be considered as more advantageous to a defendant, yet, he may sometimes prefer to be tried by the court, without a jury; and, if he deems it a privilege to be thus tried, it certainly cannot be any violation of his constitutional rights to allow him to make that election, by an express declaration that he does not wish to be tried by a jury.

There is nothing in *Hill v. People*, 16 Mich., 351, which conflicts with this conclusion.

The judgment of the circuit court affirming the judgment of the justice must therefore be affirmed.

The other justices concurred.

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STATE vs. CASSADY.

(12 Kan., 550.)

INFORMATION: *Constitutional right—Jurisdiction of acts in another state—Error in charge requested—Effect of recent possession—Arraignment and plea.*

The respondent was charged, in an information for burglary and larceny, as a principal. He was found guilty of being accessory before the fact to grand larceny. The statute permits an accessory to be charged and convicted as if he were a principal. *Held*, not in derogation of his constitutional right "to demand the nature and cause of the accusation against him," and that there was no error in the verdict.

Whether a person who in another state becomes accessory before the fact to a felony committed in Kansas can be punished under the Kansas statutes, having done himself no act within the state, *quære*.

If there is any error in a request to charge, or if a request to charge in the disjunctive is asked, either branch of which is erroneous, the whole charge is properly refused.

A charge that "the possession of stolen goods recently after they are stolen is a strong presumption of guilt," is not error.

Possession of property recently stolen makes out a *prima facie* case of guilt, and throws upon the defendant the burden of explaining that possession.

Where there was no arraignment and plea, but the respondent, being pre-

sent, announced himself ready for trial, and went to trial, without objection, the omission of the arraignment and plea will not avail the respondent on a motion for a new trial or in arrest of judgment.

BREWER, J. Defendant was tried in the district court of Atchison county, on an information charging burglary and grand larceny. The jury found him guilty of being "an accessory before the fact to grand larceny." Upon this verdict he was sentenced to two years' imprisonment. Several questions are presented in the record. The first important one is, whether under an information charging a party as principal, he can be convicted of being an accessory before the fact? In other words, must not the information charge him as accessory, and not as principal? Section 115 of the Code of Criminal Procedure (Gen. Stat., 839) provides that "any person who counsels, aids or abets in the commission of any offense may be charged, tried and convicted in the same manner as if he were a principal." See, also, § 287 of the crimes act, Gen. Stat., 380, ch. 31. The intention of the legislature in these sections is obvious. It authorizes the charging of an accessory before the fact as a principal. The intention being plain, the question of power is raised. Sec. 10 of the bill of rights (Gen. Stat., 39) declares that "in all prosecutions, the accused shall be allowed . . . to demand the nature and cause of the accusation against him." Hence counsel say: "Defendant is charged as principal, and not as accessory before the fact, and did not know and could not have known, under the information, that any evidence would be introduced tending to convict him as accessory. He had a right to demand the "nature and cause of the accusation against him," and being charged as principal, was prepared to defend himself against such charge, and no other. This section does not attempt to require that the particular connection an accused has with the offense charged shall be stated in the indictment or information. It does not attempt to indicate how much of detail or specification is essential to a criminal pleading. It requires of course a statement of the crime charged. Under an information for larceny, there could be no conviction for manslaughter. But when the crime committed is charged—larceny, as in this case—then it is not made imperative by this section that the information state the particular acts done or part performed by the accused in connection therewith. It is true, that at common law a distinction was



made between principals and accessories, according to the extent of participation in the offense. The immediate actor was called principal in the first degree; the one present, aiding and abetting, principal in the second degree; the one procuring, counseling or commanding the offense, though absent at the time of its commission, accessory before the fact; and the one knowing of the felony, and receiving and assisting the felon, accessory after the fact.

It is also true that under an indictment charging one as principal, it was impossible to convict him as accessory, and *vice versa*. 1 Chit. Cr. Law, 272; *Rex v. Plant*, 7 Car. & P., 575; Whart. Cr. Law, § 114. And as there could be no accessory without a principal, the former could not, against his consent, be convicted, except jointly with or after the latter. 1 Bish. Cr. Law, §§ 667, 668. Yet these distinctions were all based upon the relation of the accused to the crime. In the commission of one offense, all four classes might participate. The distinctions were arbitrary, and their enforcement, and the rules growing out of them, often operated to the hindrance of justice. Yet, wise or unwise, they simply classified participants in one offense. And being arbitrary, they may all be abolished, and all participants in a crime be declared equally and alike guilty, without regard to their proximity thereto, or the extent of their participation therein. The legislature has not attempted to say that the crime committed shall not be charged; that the "nature and cause of the accusation" shall not be stated; but has simply declared what acts shall render one guilty of this crime. The one acting, the one present, aiding and abetting, and the one absent, counseling, aiding and abetting, are declared to be equally and alike guilty. Nor is this the introduction of a new or harsh rule. At common law, if two engaged in the commission of an ordinary felony, and in furtherance of it, one committed murder, both were declared equally guilty thereof. The common consent to do wrong rendered each responsible for all acts done in furtherance of the wrongful purpose. Under our statutes, one indicted for an offense consisting of different degrees may be convicted of the degree charged, or of any degree inferior thereto, or of an attempt to commit the offense. Crim. Code, § 121. A somewhat similar question was before the court in the case of *McFarland v. The State*, 4 Kan., 68, and the power of the

legislature to provide that property stolen outside and brought into this state could be charged to have been stolen within the state was sustained. We see, therefore, no error in the ruling of the district court upon this point. The verdict might properly have been simply guilty of larceny. Yet specifying the particular connection of defendant with the crime did not vitiate the verdict. It wrought no prejudice to his right. *Lewis v. The State*, 4 Kan., 309.

A second very important question presented and discussed by counsel in their brief is, whether a person, who, out of the state, becomes an accessory before the fact to a felony committed within the state, can be punished under our statutes. Does the power of the state reach to such extra-territorial acts? And if it does, has the state by statute assumed to exercise this power? That this question is one of no little difficulty, see the cases of *Johns v. The State*, 19 Ind., 421; *The State v. Wyckoff*, 31 N. J., 65; 1 Bish. on Crim. Law, § 111. We do not care to enter into an examination of this question until it is fairly before us; and as the record now stands, we think the instructions aimed at this question were properly refused on other grounds. The testimony is not preserved. In the bill of exceptions it is stated that the defendant offered evidence tending to prove that the first connection of any kind he ever had with the stolen property was in the state of Missouri, and also tending to prove that he had not aided, abetted or counseled any one in the state of Kansas in the commission of the offense, and asked the following instruction: That "if the jury believe the said skins were actually stolen, and believe that the first connection defendant had with them was in the state of Missouri, then they must acquit the defendant; and if they have any doubt about this fact they must acquit the defendant." This instruction, as tendered, the court refused, but gave it modified by omitting the last clause, and adding to the rest of the instruction this proviso: "unless you further believe from the evidence he counseled, aided and abetted the taking of the same before they were so taken." It is evident the instruction asked was wrong. The defendant is not entitled to the benefit of every doubt, but only of a reasonable doubt. Again, the instruction refers to the first connection of the defendant with the *property stolen*, and not with the crime of *stealing it*. It ignores that particular phase of crime, of which the jury found the defendant

guilty. The verdict demonstrates the impropriety of the instruction. The addition made by the judge, unquestionably good law in the abstract, appears from the verdict to have been appropriate to the particular facts of this case. The other instruction bearing upon this question is thus presented in the bill of exceptions: "And the said defendant having offered some evidence tending to show that he never had said furs so alleged to have been stolen in his possession or under his control in the state of Kansas, and also having offered some evidence tending to show that he had not aided, counseled or abetted any person in the commission of said offense in the state of Kansas, asked the following instruction: 'If the jury have any reasonable doubt that the defendant ever had the furs and skins alleged to have been stolen in his possession in the state of Kansas, or any reasonable doubt that he committed the offense charged against him in the state of Kansas, either as principal or as accessory before the fact, then they must acquit the defendant.' " This instruction was refused. It presents in a disjunctive statement two conditions of acquittal. Of course if there was error in either, the instruction as a whole was properly refused. Now the first part of this instruction is subject to the same criticism as that placed upon the instruction just considered. It ignores that of which the jury found the defendant guilty, and directs acquittal upon matters which, in the view taken by the jury of the testimony, and properly so taken, as we must presume in the absence of the evidence, were wholly immaterial. It directs an acquittal if the jury have reasonable doubt of his ever having the stolen property in his possession in the state of Kansas. But if he counseled, aided and abetted the stealing, it matters not whether he ever had possession anywhere of the stolen property. It lifts a single circumstance, which may have been wholly unimportant, into an essential and determining consideration. We think, therefore, the court might properly have refused these instructions without considering the question discussed by counsel.

A third question is thus presented in the bill of exceptions: "The defendant having offered some evidence tending to prove that the only connection he had with said alleged offense was, the possession of said furs alleged to have been stolen in the state of Missouri, recently after they had been stolen, asked the following instruction: 'That proof of possession of the furs by defendant

in the state of Missouri, recently after they had been stolen, unaccompanied by any other circumstance of guilt, is not sufficient to throw the burden of proof upon the defendant to show such possession lawful, and is not sufficient of itself to authorize a conviction.' " This was refused. On the contrary, at the instance of the prosecuting attorney, the court instructed the jury, that "the possession of stolen goods recently after they are stolen is a strong presumption of guilt." That the rule that possession of property recently stolen makes out a *prima facie* case of guilt, and throws upon the defendant the burden of explaining that possession, is one of long standing and abundantly fortified by authorities, no one can question. See among others, 1 Greenl. on Ev., § 34; Burrill on Circumstantial Ev., 446, and cases cited in notes; 1 Phil. on Ev., 634, and notes, with cases cited therein; and among later cases, *Mondragon v. The State*, 33 Tex., 480; *Price's Case*, 21 Gratt. (Va.), 864; *Unger v. The State*, 42 Miss., 642; *State v. Turner*, 65 N. C., 592; *Knickerbocker v. People*, 43 N. Y., 177. Such possession is said to raise a presumption of guilt, and if unexplained, is sufficient to warrant a conviction. Some attempts have been made to qualify or limit this rule. In *The State v. Hodge*, 50 N. H., 510, it was held that this presumption of guilt was not a presumption of law, but one of fact.

In *People v. Chambers*, 18 Cal., 382; *People v. Ah-ki*, 20 id., 172; *People v. Antonio*, 27 id., 404; and *Conkwright v. The People*, 35 Ill., 204, it was held that the recent possession of stolen property, unaccompanied by other circumstances of guilt, is not sufficient to warrant a conviction. In 3 Greenl. Ev., sec. 31, it is intimated that the rule as given in 1 Greenl., sec. 34, heretofore cited, is stated too broadly, and that perhaps there should be something more than recent possession to justify a verdict of guilty. Still the overwhelming weight of authority is with the rule as stated; and, as fairly and reasonably interpreted, we think it ought to stand. It does not assume that there is any certain time, possession within which is recent possession, and therefore proof of guilt. It is not the statement of an absolute and conclusive legal presumption. It is a presumption which is strong or weak according to the nature of the property stolen, the time and place of the larceny, the time within which the possession is shown, the manner of holding, and the various other conditions which, appearing in any case, give occasion for

the application of the rule. For it must be remembered that a jury never passes upon this as an abstract question, isolated from facts and persons. A larceny must always be proved, before there can be any presumption as to who is the thief. Now, when the larceny is proved, the possession may be shown so recently, so almost instantaneously thereafter, as to render it morally certain that the possessor was the thief. To declare otherwise would be to ignore all those facts of human experience and conditions of human action which support the rule of evidence. To instruct a jury that such a recent possession was insufficient to call upon the defendant for an explanation, and, unexplained, to warrant a conviction, would insult the intelligence of every juror. As the time between the larceny and the possession is enlarged, the necessity of additional evidence appears, and in some cases the fact of possession may be but a slight circumstance indicative of guilt. There may, of course, be cases where the possession is so long after the larceny that the court ought to instruct the jury that something more than possession must be shown to justify a conviction, but as there may be cases where that possession is so recent as to warrant a verdict of guilty, this court cannot, in the absence of a full statement of the facts, say that the district court erred in refusing to instruct the jury contrary to the ancient rule.

Whatever suggestions, explanations or qualifications may be appropriate in any case, will depend upon the peculiar facts of that case. All that we decide here is, that it is not necessarily error to refuse an instruction like that asked, even when there is some testimony tending to show that the only connection defendant had with the offense was in the recent possession of the stolen property. One suggestion more in reference to this question: The verdict of the jury shows that defendant was not present at the time of the commission of the offense, and therefore did not then acquire the possession of the stolen property. What the testimony was upon which the jury found that he incited, procured, counseled or abetted beforehand the larceny, we are not informed. It may well be that this whole matter of recent possession was, in the view taken by the jury and justified by the testimony, wholly immaterial.

The record fails to show that defendant was arraigned or pleaded to the information. It shows that he appeared in per-

son and by counsel, and that both parties being ready for trial on the information filed, a jury was called and the case tried. An affidavit appears in the transcript to the effect that as a matter of fact the defendant was not arraigned, and did not plead; but by what right such affidavit appears in the transcript we can not tell. It was not made a part of the bill of exceptions, nor does it appear to have been used upon any of the motions in the case. Assuming it, however, to be proven, that the defendant was not arraigned, and did not enter a formal plea, but being present in person and by counsel, and announcing himself ready for trial upon the information, went to trial before a jury regularly impaneled and sworn, and submitted the question of guilt to their determination, will the omission of the arraignment, or formal plea, avail the defendant thereafter, either on a motion for new trial, or in arrest of judgment? It may be conceded that at common law it would. See the authorities cited by defendant in his brief. But under our statutes we think a different rule must obtain. By section 161 of the Criminal Code (Gen. Stat., §46) it is declared that when a person shall be arraigned "it shall not be necessary to ask him how he will be tried; and if he deny the charge in any form, or require a trial, or if he refuse to plead or answer, and in all cases where he does not confess the indictment or information to be true, a plea of not guilty shall be entered, and the same proceedings shall be had in all respects as if he had formally pleaded not guilty." And by section 293 it is provided, that "in an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." It seems to us that under those sections, the omission did not and could not affect the substantial rights of the defendant, and therefore is not ground for disturbing the judgment. *The State v. Lewis*, 10 Kan., 157. These are all the questions we deem it necessary to consider, and there appearing in them no substantial error, the judgment of the district court will be affirmed.

All the justices concurred.

NOTE.—The following note on the effect of the recent unexplained possession of stolen property, as evidence in cases of larceny and kindred offenses, is kindly contributed by Michael Finnane, Esq. It is believed that every American case on the subject is here cited, and the doctrine for which it is an authority accurately pointed out.—*REP.*

The frequency with which the possession of property recently stolen occurs in cases of larceny as evidence of guilt suggests the propriety of calling attention to some of the late cases in which the question has been passed upon, which greatly modify, if not directly alter, the doctrine until recently considered as settled on that subject.

The doctrine of the common law is stated by Roscoe to be, "when it is proven or may be reasonably presumed that the property in question is stolen, the *onus probandi* is shifted, and the possessor is bound to show that he came by it honestly, and if he fails to do so, the presumption is that he is the thief or the receiver, according to circumstances." Rosc. Crim. Ev., 18.

The author there cites a number of cases as to the length of time that must elapse before the accused is relieved of the necessity of explaining the possession, showing that whether possession is "recent" or not, has always been regarded as a question of law to be declared by the court, as distinguished from a presumption of fact to be found by the jury.

The doctrine of the common law is approved by Greenleaf, who says: "Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and if unexplained, either by direct evidence or attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive." 1 Greenl. Ev., sec. 34.

It is not surprising that the rule laid down by so high an authority was followed by most of the American courts in the earlier cases, and accordingly it may be said that the weight of authority on this subject was greatly in favor of the doctrine of Greenleaf. Whart. Crim. Law, 728; *Com. v. Millard*, 1 Mass., 6; *State v. Brewster*, 7 Vt., 122; *State v. Engleman*, 2 Ind., 91; *State v. Smith*, 2 id., 402; *State v. Merrick*, 19 Me., 398; *State v. Weston*, 9 Conn., 527; *Alzorth v. State*, 10 Fla., 207; *Hughes v. State*, 8 Humph., 75; *State v. Wolff*, 15 Mo., 537; *Jones v. People*, 12 Ill., 259; *Knickerbocker v. People*, 43 N. Y., 177; *State v. Briuer*, 34 Mo., 537; *Wise v. State*, 10 Fla., 207; *State v. Gray*, 37 Mo., 463; *Tuberville v. State*, 42 Ind., 490; *Smothers v. State*, 46 id., 447; *State v. Williams*, 54 Mo., 170; *Fuller v. State*, 48 Ala., 273; *Uryer v. State*, 42 Miss., 642; *State v. Cassidy*, 12 Kan., 550; *Jones v. State*, 49 Ind., 549; *State v. Turner*, 65 N. C., 592; *State v. En*, 10 Nev., 277; *State v. Groves*, 72 N. C., 482.

Many of the courts refused to accept this rule, not only because it deprived the accused of the right to have the jury pass, uninfluenced by the court, upon every fact and circumstance in the case indicative of guilt or innocence, but also in its enforcement, it was found to impose an unjust burden on the accused; it shifted the burden of proof, and required the accused, at the peril of his liberty, to make a reasonable explanation, which at times, however candid and truthful, from the character of the statement or from his demeanor while making it, tended only to strengthen the proof of his guilt. *Knickerbocker v. People*, 43 N. Y., 177; *Monaghan v. State*, 33 Tex., 480.

On the other hand, its application very frequently defeated the proper administration of the law by enabling the artful criminal, by giving a reasonable, or which practically amounted to the same thing, a plausible account of the possession, to cast the burden of proving the falsity of the account upon the prosecution, which, in many instances, became impossible. 3 Greenl. Ev., 32; *Jones v. State*, 30 Miss., 653; *Belote v. State*, 36 id., 96; *Gracia v. State*, 26 Tex., 209; *Hughes v. State*, 8 Humph., 75; *State v. Brewster*, 7 Vt., 118; *State v. Weston*, 9 Conn., 527; *State v. Groves*, 72 N. C., 482.



Although many of the American states have adhered to the doctrine of Greenleaf and the earlier cases, yet the weight of authority to be collected from the recent cases bearing on this subject is in favor of the rule, in our opinion the correct one, which is briefly, yet entirely, stated by the court in *Thompson v. State*, 43 Tex., 268: "It is error to charge that mere possession of property recently stolen, unexplained, is *prima facie* evidence of guilt. The rule is that the possession of property recently stolen is evidence against the accused which, like all other evidence, is to be taken and considered by the jury in connection with other testimony in the case." 2 Bish. Crim. Proc., 740; *Reg. v. Langmead*, 9 Cox Crim. Cases, 465; *State v. Hodge*, 50 N. H., 510; *Conkright v. People*, 55 Ill., 204; *People v. Chambers*, 18 Cal., 382; *State v. Hazard*, 12 Minn., 293; *Yates v. State*, 37 Tex., 202; *State v. Williams*, 2 Jones (N. C.), 194; *People v. Ah Ki*, 20 Cal., 177; *State v. Shaw*, 4 Jones (N. C.), 440; *State v. Reid*, 20 Iowa, 418; *People v. Gitty*, 49 Cal., 581; *People v. Rodondo*, 44 id., 538; *Storer v. People*, 56 N. Y., 315. In the last case, the former decisions on this subject in New York, and already cited, were overruled, and the court held: "It is obvious that a party cannot, as a matter of law, be adjudged guilty of larceny upon proof that property has been stolen and recently thereafter found in his possession in the absence of any explanation. \* \* In other cases juries have been instructed that this proof casts upon the accused the burden of showing how he acquired possession, and if he failed to satisfy them that he did so innocently, it was their duty to convict. Such instructions are erroneous. It is for the prosecution to prove the commission of the crime charged by the accused, and the burden of doing so continues during the entire trial."

There is another class of cases that can be distinguished from those already cited, which hold it to be error for the court to charge as a matter of law that the recent possession of stolen property unexplained is *prima facie* evidence of guilt, yet say that it creates a presumption of fact against the accused which, if not rebutted, warrants the jury in convicting.

This class of cases can be best illustrated by the language of the court in *Kelly v. State*, 20 Wis., 231:

"If within a short time after the theft, the stolen property was found in possession of the prisoner, the burden was on him to show how he came by it, otherwise, he might be presumed to have obtained it feloniously; but such presumption might be rebutted by the circumstances proved; that it was a presumption of fact, and if the evidence led to a reasonable doubt whether it was well founded, that doubt would avail in favor of the accused." *Blakeley v. State*, 52 Ind., 161; *State v. Walker*, 1 Ia., 217; *Thomas v. State*, 43 Tex., 658; *Barnes v. State*, id., 93; *Thompson v. State*, id., 268; *Com. v. Randall*, 119 Mass., 107; *Davis v. State*, 50 Miss., 86; *State v. En*, 10 Nev., 227; *State v. Lange*, 59 Mo., 418.

While many courts have, in our judgment, attached too great weight to the possession of property recently stolen, as evidence of guilt, other courts have gone too far in the opposite direction, holding that the jury are not justified in drawing the inference of guilt from evidence only of the unexplained possession of property recently stolen. *People v. Chambers*, 18 Cal., 382; *Yates v. State*, 37 Tex., 202; *People v. Noregea*, 48 Cal., 123; *State v. Williams*, 3 Nev., 409.

This rule also infringes on the exclusive province of the jury who are authorized, and in many cases ought to conclude that the defendant is guilty, when the only evidence is the unexplained possession of property recently stolen. While the

rule we have contended for as correct has not met with universal favor even by the late cases. *Foster v. State*, 52 Miss., 695; *State v. Turner*, 65 N. C., 592; *Comfort v. People*, 54 Ill., 404; yet we think it is supported by the better reasoning. In its application it leaves all the facts to be determined by the jury with whom from the policy, reason and spirit of the criminal law it exclusively belongs.

We have sought in vain to discover from the authorities any reason or justice in the rule that allows the court to draw a presumption of law from one or more facts in the case, and then strengthened by the opinion of the court to apply this presumption to the other facts in the same case. We think the court is acting upon assumed power when it undertakes to say, as a matter of law, what is *prima facie* evidence of guilt, when and upon whom the burden of proof shifts, what is a sufficient or reasonable account or explanation, and what is not. The simpler rule, and the one by far more calculated to insure impartial justice, is to presume every man innocent until the contrary is proven beyond a reasonable doubt, and as to when that is, if left to the jury, will never be a source of embarrassment to the court, or to the administration of the law.

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### BULLARD vs. STATE.

(38 Tex., 504.)

#### PRACTICE: *Jury of thirteen.*

Where, by mistake, thirteen jurors are impaneled and render a verdict, the verdict will be set aside.

It seems that, if the last juror sworn on a jury of thirteen could be pointed out before the jury retired, he might be dismissed and the trial proceed.

WALKER, J. We need notice but one of the errors assigned for reversing this case.

The appellant was indicted for horse stealing, in the district court of Ellis county, and tried before a jury of thirteen men, convicted, and adjudged to suffer imprisonment in the penitentiary for the term of ten years. This is certainly a very novel irregularity in a Texas court. Article 3007, Pasch. Dig., declares "that the only mode of trial upon issues of fact in the district court is by a jury of *twelve men*, except in certain cases otherwise provided for."

Similar cases have seldom occurred, but where they have occurred, the courts in England and in the different states have expressed a diversity of opinion. In Mississippi, a verdict of

thirteen jurors was set aside. *Wolf et al. v. Martin*, 1 How., 30. In *Tileman et al. v. Ailles*, 5 Smedes & Marsh, 378, the court refused to allow it as error, that the verdict was rendered by thirteen jurors, but state that if it had been rendered by a less number than twelve, it would be void. In Kentucky, the court held that the defendant being present, and not objecting when the jury was sworn, could not maintain it as error that the verdict was rendered by thirteen jurors. 5 B. Mon., 120.

In *Ross v. Neal*, 7 Minn., 407, the court held the verdict void, if excepted to in the court below.

The English courts have allowed the last juror sworn to be discharged from the panel, and the trial to proceed, where the mistake is discovered before the jury retired to deliberate. But we think, under our law, there is no room for the courts to speculate upon such irregularity. If the fact is discovered before the verdict is rendered, the cause should be withdrawn from the jury, and a lawful jury impaneled and sworn to try it; or, if the last juror sworn can be pointed out, he may be dismissed from the panel, and the trial proceed before a legally constituted jury. But if more jurors than the legal number are permitted to deliberate on the verdict, the verdict should be set aside and a new trial awarded.

The judgment in this case is reversed and the cause remanded.

*Reversed and remanded.*

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LAVIN vs. PEOPLE.

(69 Ill., 303.)

PRACTICE: *Examination of juror on voir dire.*

On a trial for an unlawful sale of intoxicating liquor, the respondent has a right to ask the jurors on their *voir dire* to enable him to exercise his right of peremptory challenge, whether they are members of a temperance society or have contributed money in aid of liquor prosecutions.

CRAIG, J. At the October term of the criminal court of Cook county, an indictment was found by the grand jury, against

Michael Lavin, for selling intoxicating liquors to a certain person who was in the habit of getting intoxicated.

At the January term, 1873, of the court, a trial was had before a jury, and the defendant found guilty.

In selecting a jury to try the cause in the criminal court, the defendant propounded to each juror called, the following questions: *First.* Are you a member of a temperance society. *Second.* Are you connected with any society or league organized for the purpose of prosecuting a certain class of people, under what is called the new temperance law of the state; or have you ever contributed any funds for such a purpose?

The people, by the state's attorney, objected to the jurors answering the questions, and the court sustained the objection, and would not permit the jurors to answer, and to this ruling of the court defendant excepted.

It is the policy of our laws to afford each and every person who may have a cause for trial in our courts, a fair and impartial trial. This can only be done by having the mind of each juror who sits to pass judgment upon the life, liberty or rights of a suitor entirely free from bias or prejudice. In order to determine whether the person who may be called as a juror possesses the necessary qualifications, whether he has prejudged the case, whether his mind is free from prejudice or bias, the suitor has the right to ask him questions, the answer to which may tend to show he may be challenged for cause, or disclose a state of facts from which the suitor may see proper to reject such juror peremptorily.

In the case of the *Commonwealth v. Egan et al.*, 4 Gray, 18, which was an indictment for being common sellers of spirituous liquors, Egan, before his cause was opened to the jury, inquired if any member of the panel belonged to the Carson League, and one answered that he was a member of said league; that, as he understood it, the object of the society was to prosecute persons for violation of the liquor law, so called; that assessments were made upon members for the purpose of carrying out the objects of the society; that they had paid one assessment, and expected to pay more; that there was nothing in the existence of this membership to prevent his giving a fair and impartial verdict according to the evidence. The defendant objected to the juryman, but the court overruled the objection, and allowed him to

remain on the panel. The appellate court, in deciding the case, said: "We deem it to be our duty to say, that, in our judgment, the members of any association of men combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of the cause in which the question is, whether the defendant shall be found guilty of violating that law." In case of *The People v. Reges et al.*, 5 Cal., 347, the supreme court of California, on a case analogous, held substantially as did the court in Massachusetts.

We are not, however, in this case, called upon to decide whether an affirmative answer to the questions propounded to the jurors would have been ground of challenge for cause. The questions were asked with a view to call out facts upon which to base a peremptory challenge, and for this purpose they were proper, and should have been answered.

That the refusal of the court to permit the questions asked to be answered was error, for which the judgment should be reversed, there can be no doubt. *Brooks v. Bruyn*, 35 Ill., 395; *Bissel v. Ryan*, 23 id., 566.

It can not be said the cause was tried by a jury, such as is contemplated by law.

The other questions raised in the case are settled by the case of *McCutcheon v. The People*, ante, 471.

For the error indicated, the judgment will be reversed and the cause remanded.

*Judgment reversed.*

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STATE vs. SMITH.

(75 N. C., 306.)

PRACTICE: Prosecuting officer.

It is error for the court to allow a prosecuting officer to use this language in addressing the jury: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known."

It is error for the court to allow a prosecuting officer to use this language in addressing the jury: "The bold and brazen-faced rascal had the impudence

to write me a note yesterday, begging me not prosecute him, and threatening me if I did, he would get the legislature to impeach me." It is the duty of the court to protect the prisoner from unreasonable and unfair statements and arguments.

BYNUM, J. It is necessary to notice only one of the defendant's exceptions, as upon that he is entitled to a new trial. The solicitor, prosecuting in behalf of the state, in addressing the jury, was allowed by the court to use the following language: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." And, again: "The bold, brazen-faced rascal had the impudence to write me a note yesterday, begging me not to prosecute him, and threatening me if I did, he would get the legislature to impeach me."

The purpose and natural effect of such language was to create a prejudice against the defendant, not arising out of any legal evidence before them; for the jury were precluded from inquiry into the causes or motives for moving the trial, and even from the knowledge whether the trial was moved by the state or the defendant. So in respect of the letter, alleged to have been received from the defendant, and the epithets predicated upon it; it was not in evidence, and could not be, yet its alleged contents were allowed to go to the jury with all the force and effect of competent testimony. Such a letter constituted a new and distinct offense, and was the proper subject of another indictment and prosecution. These charges and invectives were not only allowed to go to the jury, but were unexplained and uncorrected by his honor in his charge to the jury. In *Dennis v. Haywood*, 63 N. C., 53, the course here pursued by the solicitor is strongly reprobated. "Suppose," said the court, "a defendant is to be tried for his life, and to escape unreasonable prejudices in one county he removes his trial to another, the fact that he does so may be used to excite the prejudice that he is endeavoring to escape justice, and thus he would escape the prejudices of one community to find them intensified in another. Would the court allow the fact to be given in evidence or commented on by the counsel? Certainly not." So in *Jenkins v. The N. C. Ore Dressing Co.*, 65 N. C., 563, it is said: "Where the counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him there and

then. If he fails to do so, and the impropriety is gross, it is good ground for a new trial." And in the *State v. Williams*, 65 N. C., 505, a new trial was granted in a case where language less harsh and violent was allowed by the court; and it was there said that it was the duty of the court to interpose for the protection of witnesses and parties, especially in criminal cases, where the state is prosecuting one of its citizens. The defendant was arraigned at the bar of the court mute and helpless, without raising an unseemly controversy with the solicitor. The court is his constituted shield against *all* vituperation and abuse, and more especially when it is predicated upon alleged facts not in evidence, or admissible in evidence.

There is error.

PER CURIAM:

*Venire de novo.*

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FERGUSON vs. STATE.

(49 Ind., 33.)

PRACTICE: *Provocation to reduce homicide to manslaughter.*

On a criminal trial for homicide, it is error for the court to allow counsel for the prosecution in addressing the jury to comment on the frequency of that crime in the community, and say to the jury that it is due to the lax administration of the law, and urge them to make an example of the respondent.

It is error to charge a jury on a trial for murder that "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given *immediately* upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder and not manslaughter."

PETTIT, J. The appellant was indicted for murder in the first degree, for killing John Stillhammer, and was convicted of murder in the second degree, and sentenced to the penitentiary for life. A bill of exceptions shows the following facts, which were also assigned as a cause for a new trial:

"And during the progress of the argument of counsel, counsel for the state commented on the frequent occurrence of murder in the community, and the formation of vigilance committees



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and mobs, and that the same was 'caused by' the laxity of the administration of the laws, and stating to the jury that they should make an example of the defendant. And the defendant, by his counsel, asked the court to restrain the counsel, and objected to said comments, because there was no evidence of such matters before the jury; but the court overruled said motion, and remarked in the hearing and presence of the jury, that such matters were proper to be commented upon, to which the defendant at the proper time excepted, and still excepts."

The comments and arguments of counsel and the remarks of the court during a trial may be within the discretion of the judge presiding, but it is a judicial discretion, and if improperly used to the injury of either party, it may and ought to be revised and controlled by this court. If it was proper to present these things to and comment on them before the jury, it was proper for the jury to consider them in making up their verdict. These things were outside of the record and the evidence, and were calculated to prejudice the rights of the defendant. It was tantamount to saying to the jury, murders have been committed, vigilance committees formed, and mobs assembled in this county, and you may take these matters into consideration in making your verdict; and as you have got a chance now, you may make an example of defendant. The jury may have come to a different conclusion from what they would, if the court had quietly rebuked the counsel, and told him to keep his argument within the facts and evidence in the case. The action of the court was an error, for which, if for no other cause, the judgment must be reversed.

The court gave the following instruction to the jury:

"To reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder, and not manslaughter."

No authority is cited, and we think none can be found to sustain this instruction, except Bick. Crim. Pr., 280, in this state, and the authority he cites does not sustain him. The authorities, elemental and decided, are against the validity of this instruction.

Zell's Encyclopedia: "Immediately. Without the intervention

of any other cause or event. At the present time, on the moment; directly; quickly; at once; *instantly*."

Burrill's Law Dict.: "Immediate. In old English law, immediately; directly; without anything intermediate."

When a great wrong or injury has been done to or inflicted on a man which has excited his passion, he is not required to punish or resent it at once, but may have such time as is necessary for his passion to cool off; and his physical and mental organization should be taken into consideration in such a case.

All elemental authority and adjudicated cases agree that in such case time must be given for the passion of the injured person to become calm, and many authorities say that the question ought to be submitted to the jury as to whether the passion of the injured person had been actually quieted. We cite, without quoting the following authorities: *Ex parte Moore*, 30 Ind., 197; 1 Hale P. C., 453; *The State v. Hildreth*, 9 Ired., 429; *The State v. Yarbrough*, 1 Hawks, 78; *Commonwealth v. Webster*, 5 Cush., 295; *The People v. Johnson*, 1 Parker, C. C., 291; Foster's Cr. Cas., 290.

The instruction given was erroneous, and the case must be reversed for this as well as for a former noticed error.

The judgment is reversed; and the clerk is directed to issue the proper notice for the return of the prisoner.

NOTE.—The following account which Lord Campbell gives of the behavior of the judge and the prosecuting counsel on the trial of Sir Walter Raleigh when contrasted with the rulings in the case in the text, illustrates very strikingly the progress that has been made in the conduct of criminal trials: "The rulings of Chief Justice Popham at this trial would seem very strange in our day, but in his they caused no surprise nor censure. In the first place he decided, against an able argument from the prisoner, who conducted his own defense, that, although the charge was high treason, it was sufficiently supported by the uncorroborated evidence of a single witness, and, secondly, that there was no occasion for this witness to be produced in court, or sworn, and that a written confession by him, accusing himself and implicating the prisoner, was enough to satisfy all the requisitions of common and statute law on the subject. Raleigh still urged that Lord Cobham, his sole accuser, should be confronted with him. *Popham, C. J.* "This thing cannot be granted, for then a number of treasons should flourish; the accuser might be drawn in practice whilst he is in person." *Raleigh*. "The common trial in England is by jury and witnesses." *Popham, C. J.* "If three conspire a treason, and they all confess it, here is never a witness, and yet they are condemned." *Raleigh*. "I know not how you conceive the law." *Popham, C. J.* "Nay, we do not conceive the law, but we know the law." *Raleigh*. "The

wisdom of the law of God is absolute and perfect. *Hoc fac et vives*, etc. Indeed where the witness is not to be had conveniently, I agree with you; but here he may; he is alive, and under this roof. Susannah had been condemned if Daniel had not cried out, 'Will you condemn an innocent Israelite without examination or knowledge of the truth?' Remember it is absolutely the commandment of God: 'If a false witness rise up, you shall cause him to be brought before the judges; if he be found false he shall have the punishment that the accused should have had.' It is very easy for my lord to accuse me, and it may be a means to excuse himself." *Popham, C. J.* "There must not such a gap be opened for the destruction of the king as there would be if we should grant this. You plead hard for yourself, but the laws plead hard for the king." *Raleigh*: "The king desires nothing but the knowledge of the truth, and would have no advantage taken by severity of the law. If ever we had a gracious king, now we have. I hope as he is, so are his ministers. If there be a trial in an action for a matter but of five marks value, a witness must be produced and sworn. Good, my lord, let my accuser come face to face, and see if he will call God to witness for the truth of what he has alleged against me." *Popham, C. J.* "You have no law for it.... You have no just matter of complaint that you had not your accuser come face to face; for such an one is easily brought to retract when he seeth there is no hope of his own life. It is dangerous that any traitors should have access to or conference with one another; when they see themselves must die, they will think it best to have their fellow live, that he may commit the like treason again, and so in some sort seek revenge." *Lives of the Chief Justices*, vol. 1, p. 228.

His, Coke's, first appearance as public prosecutor in the new reign was on the trial, before a special commission at Winchester, of Sir Walter Raleigh, charged with high treason, by entering into a plot to put the Lady Arabella Stuart on the throne; and here, I am sorry to say, that, by his brutal conduct to the accused, he brought permanent disgrace upon himself and upon the English bar. He must have been aware that, notwithstanding the mysterious and suspicious circumstances which surrounded this affair, he had no sufficient case against the prisoner, even by written depositions and according to the loose notions of evidence then subsisting; yet he addressed the jury, in his opening, as if he were scandalously ill used by any defense being attempted. While he was detailing the charge, which he knew could not be established, of an intention to destroy the king and his children, at last the object of his calumny interposed, and the following dialogue passed between them: *Raleigh*. "You tell me news I never heard of." *Attorney General*. "Oh, sir, do I? I will prove you the notorious traitor that ever held up his head at the bar of any court." *R.* "Your words cannot condemn me; my innocency is my defense. Prove one of these things wherewith you have charged me, and I will confess the whole indictment, and that I am the horriblest traitor that ever lived, and worthy to be crucified with a thousand thousand torments." *A. G.* "Nay, I would prove all; thou art a monster; thou hast an English face, but a Spanish heart." *R.* "Let me answer for myself." *A. G.* "Thou shalt not." *R.* "It concerneth my life." *A. G.* "Oh, do I touch you?"

The proofless narrative having proceeded, Raleigh again broke out with the exclamation: "You tell me news, Mr. Attorney!" and thus the altercation was renewed. *A. G.* "Oh, sir, I am the more large because I know with whom I deal; for we have to deal to-day with a man of wit. I will teach you before I

have done." *R.* "I will wash my hands of the indictment and die a true man to the king." *A. G.* "You are the absolutest traitor that ever was." *R.* "Your phrases will not prove it." *A. G. (in a tone of assumed calmness and tenderness)* "You, my masters of the jury, respect not the wickedness and hatred of the man; respect his cause; if he be guilty, I know you will have care of it, for the preservation of the king, the continuation of the Gospel authorized, and the good of us all." *R.* "I do not yet hear that you have offered one word of proof against me. If my Lord Cobham be a traitor, what is that to me?" *A. G.* "All that he did was by thy instigation, thou viper; for I *thou* thee, thou traitor."

The depositions being read, which did not by any means make out the prisoner's complicity in the plot, he observed: "You try me by the Spanish inquisition, if you proceed only by circumstances, without two witnesses." *A. G.* "This is a treasonable speech." *R.* "I appeal to God and the king on this point, whether Cobham's accusation is sufficient to condemn me?" *A. G.* "The king's safety and your clearing cannot agree. I protest before God I never knew a clearer treason. Go to, I lay thee upon thy back for the confidentest traitor that ever came at a bar."

At last, all present were so much shocked that the Earl of Salisbury, himself one of the commissioners, rebuked the attorney general, saying, "Be not so impatient, good Mr. Attorney, give him leave to speak."

*A. G.* "If I may not be patiently heard, you will encourage traitors and discourage us. I am the king's sworn servant, and must speak."

The reporter relates that "here Mr. Attorney sat down in a chafe, and would speak no more, until the commissioners urged and entreated him. After much ado he went on, and made a long repetition of all the evidence, and thus again addressing Sir Walter: "Thou art the most vile and execrable traitor that ever lived. I want words to express thy viperous treasons." "*Lives of the Chief Justices*, vol. I, p. 364.

#### GOLDEN vs. STATE.

(49 Ind., 424.)

PROSECUTING OFFICER: *Corrupt agreement.*

An agreement with a prosecuting officer that if respondent will plead guilty to an information, respondent shall not be prosecuted on another information then pending for a like offense, is a corrupt agreement, and entitles the respondent to no indulgence or relief.

BIDDLE, J. Prosecution by the state against the appellant, by affidavit and information, for selling intoxicating liquor to a minor.

Motion to quash overruled; exception; plea; guilty; fine.

The appellant afterward appeared in open court and filed the following affidavit:

"Elza Golden, being duly sworn, upon oath says, that he is the defendant in the above entitled cause; that on the 25th day of April, 1874, one John M. Vanfleet, who was then and there deputy prosecuting attorney for Wesley C. Glasgow, the prosecuting attorney of the thirty-fourth judicial circuit of Indiana, of, in, and for the township of Concord, Elkhart county, Indiana, the same being within said thirty-fourth judicial circuit, filed in the office of the clerk of this court an affidavit and information charging this defendant with having unlawfully sold, bartered and given to one Charles E. Jessup, a minor under the age of twenty-one years, one glass of intoxicating liquor, to be drunk at, and in the house where sold, in violation of law, and which said affidavit and information are attached hereto and made a part hereof, and marked "A" and "B" respectively; that a warrant was duly issued on said affidavit and information, on said day, by the clerk of this court, and duly served on this defendant by John W. Egbert, sheriff of this county and of this court, and by means of which this defendant was brought before this court under arrest, and compelled to give bail for his appearance herein from day to day; that said cause was regularly placed on the trial docket of this court 83; that while so on the docket of said court and pending herein, to wit: on the 6th day of May, 1874, the said John M. Vanfleet, who was then and there acting as an officer of this court, and recognized as such by the court, and permitted to prosecute the pleas of the state in said cause, in said court by the judge of said court, stated and represented, and affirmed to this affiant, that if affiant would plead guilty in said cause, the fine should only be ten dollars and costs, and that he, the said Vanfleet, would dismiss and enter a *nolle prosequi* in other similar prosecutions then pending in said court against affiant for another alleged violation of the liquor law, viz.: cause 84 on the criminal docket of this court, and also dismiss another similar cause against Sylvester W. Shumard, then pending in said court, viz.: cause numbered 85 on the criminal docket of this court; and said Vanfleet further represented then and there to affiant, that such plea of guilty in said cause would not invalidate or forfeit affiant's permit to sell intoxicating liquors, which had theretofore been duly granted to affiant, and that he, said Vanfleet, would give affiant his word and honor that his said permit would not be forfeited, and that affiant should not

be disturbed in his business of selling intoxicating liquors under said permit, until a judgment of forfeiture should be regularly obtained, which could not be done until the next term of the court in September next, and upon an action regularly instituted against affiant for that purpose; that affiant being ignorant of the law in this respect, and believing that said Vanfleet knew and correctly stated the law to him, and fully relying upon such belief, and upon said Vanfleet's words, so pledged, that affiant should not be disturbed in his said business, consented to, and did thereafter plead guilty in said first named cause, and submit to a judgment of ten dollars and costs therein against him, and did pay to said Vanfleet his fee as prosecuting attorney, viz.: five dollars, and also the other costs taxed in said other cause, number 84, and so dismissed, amounting in all to twelve dollars and fifty cents, which said Vanfleet received; and affiant further says, that he was not and is not guilty of the offense charged against him in said information and affidavit filed in said cause number 83; that he did not so sell any intoxicating liquor to said Charles E. Jessup, in violation of law as therein charged, but that he so pleaded guilty in said causes solely for the reason that he believed the cost to him, in time and money expended, would be greater to defend said causes, than to plead guilty and pay said judgment, and because of such statements so made by said Vanfleet; that afterward, viz.: on the 13th of May, 1874, the said Vanfleet formally notified affiant by letter that if affiant sold any more intoxicating liquor, he Vanfleet, as such prosecuting attorney, would prosecute affiant for all such sales, as for selling intoxicating liquor without a permit, and that said affiant should be so prosecuted, and his place of business should and would be abated as a nuisance by reason of such sales; and affiant further says, that he had theretofore duly obtained a permit to sell intoxicating liquor at his said place of business, and had then, and yet has, a large sum of money invested in said business on the faith of such permit and relying thereon for authority to continue such business; that he would not so have pleaded guilty in said cause but for said representations and inducements so made and held out by said Vanfleet, and that he will be greatly injured in loss of time, expenses of defense, and otherwise, if said Vanfleet prosecutes him as he threatens to do; and that to avoid such prosecution, affiant believes he will be

compelled to close his said place of business, to his great injury and damage, unless the judgment in this cause, number 83, be set aside, and he be allowed to defend said cause. ELZA GOLDEN.

"Subscribed and sworn to before me, this 3d day of June, 1874.

LAPORT HEFNER, *Clerk*."

The affidavit of Sylvester W. Shumard was also filed in support of the appellant's affidavit. Upon these affidavits the appellant moved the court to set aside the judgment and allow him to plead not guilty to the information. The court denied his motion; he excepted, and appeals to this court.

The appellant, having shown us by his own affidavit that he accepted a corrupt proposition and corruptly purchased his indulgence, is not entitled to relief.

The judgment is affirmed.

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McCOY vs. STATE.

(52 Ga., 287.)

PRACTICE: *Refusing illegal verdict.*

It is not error to refuse to record an illegal verdict, and to direct the jury to retire again and bring in a verdict in accordance with the charge of the court. Under an indictment against respondent, charging him as principal, a verdict of guilty as accessory after the fact is illegal.

TRIPPE, J. 1. The defendant was jointly indicted with three others for larceny from the person. The jury first came in with a verdict finding the defendant "guilty as accessory after the fact." The court directed them to return to their room, and if they found a verdict, it must be guilty or not guilty. The verdict was rightly rejected by the court, because it was an illegal verdict under the indictment, as will be seen presently.

2. The verdict being an illegal one, the court had the power, and it was its duty to reject it, and to give the directions that were given. *Williams v. The State*, 46 Ga., 647.

3. Was the verdict illegal? "An accessory after the fact is a person who, after full knowledge that a crime has been commit-



ted, conceals it from the magistrate, and harbors, assists or protects the person charged with or convicted of the crime." Code, sec. 4308. This court has twice decided that on an indictment charging a defendant as principal in the first degree, or as the actual perpetrator of the crime, he cannot be convicted as principal in the second degree. *Washington v. The State*, 36 Ga., 222; *Shaw v. The State*, 40 id., 120. Granting, *ex gratia*, that in misdemeanors there may be accessories, on which, see *Lewis v. The State*, 33 id., 137, or that the accessory may be put on trial before the conviction of the principal, see *Smith v. The State*, 46 id., 298; not even then, under the principle on which the decision in *Washington v. The State* is put, could the defendant be convicted as accessory upon an indictment charging him as a real actor and perpetrator of the crime. In that case, the ground on which the decision was placed, to wit, that a defendant who is charged as the perpetrator of the crime cannot be convicted as principal in the second degree is, "for the obvious reason that the accusation does not notify him that he will be held responsible for such acts as will make him a principal in the second degree, and therefore he is taken by surprise at the trial;" and "that he will have had no notice that he will be required to meet such evidence or be prepared to rebut or explain it." This will apply to the case of an accessory as well as that of a principal in the second degree. An examination of the sections defining the two classes of offenders will show this at once. Without determining whether there can be an accessory in misdemeanors, we say that under this indictment the first verdict returned by the jury was illegal, and was properly rejected by the court. 7 C. & P., 575.

4. Upon a second consideration of the case, the jury returned a verdict of guilty, and the court refused to set it aside on the ground taken in the motion for a new trial, that it was contrary to the evidence. This is one of that numerous class of cases wherein all we have to say on this point is, that we do not think it was such an abuse of discretion as to call for the interference of this court.

*Judgment affirmed.*

NOTE. — The following account of a very celebrated encounter between Erskine and BULLER is taken from the "Speeches of Lord Erskine," vol. 1, p. 138. It occurred on the trial of the Dean of St. Asaph, for libel. No question was afterwards made by Erskine but that Justice BULLER had acted strictly within his duty, in

satisfying himself that the jury comprehended the verdict which they gave, and in having it recorded according to their intent:

The jury withdrew to consider of their verdict, and in about half an hour returned again into court.

*Associate.* Gentlemen, do you find the defendant guilty or not guilty?

*Foreman.* Guilty of publishing, only.

*Mr. Erskine.* You find him guilty of publishing, only?

*A juror.* Guilty only of publishing.

*Mr. Justice Buller.* I believe that is a verdict not quite correct. You must explain that one way or the other, as to the meaning of the innuendoes. The indictment has stated that G. means Gentlemen; F., Farmer; the King, the King of Great Britain, and the Parliament, the Parliament of Great Britain.

*One of the jury.* We have no doubt of that.

*Mr. Justice Buller.* If you find him guilty of publishing, you must not say the word *only*.

*Mr. Erskine.* By that, they mean to find there was no sedition.

*A juror.* We only find him guilty of publishing. We do not find anything else.

*Mr. Erskine.* I beg your lordship's pardon, with great submission. I am sure I mean nothing that is irregular. I understand they say, We only find him guilty of publishing.

*A juror.* Certainly; that is all we do find.

*Mr. Broderick.* They have not found that it is a libel of and concerning the king and his government.

*Mr. Justice Buller.* If you only attend to what is said, there is no question or doubt. If you are satisfied whether the letter G. meant Gentleman, whether F. means Farmer, the King means the King of Great Britain, the Parliament, the Parliament of Great Britain—if they are all satisfied it is so, is there any other innuendo in the indictment?

*Mr. Leycester.* Yes; there is one more upon the word *votes*.

*Mr. Erskine.* When the jury came into court, they gave, in the hearing of every man present, the very verdict that was given in the case of *The King v. Woodfall*; they said, Guilty of publishing, only. Gentlemen, I desire to know whether you mean the word *only* to stand in your verdict?

*One of the jury.* Certainly.

*Another juror.* Certainly.

*Mr. Justice Buller.* Gentlemen, if you add the word *only*, it will be negating the innuendoes; it will be negating that by the word King it means the King of Great Britain; by the word Parliament, Parliament of Great Britain; by the letter F., it means Farmer, and G., Gentleman; that, I understand, you do not mean.

*A juror.* No.

*Mr. Erskine.* My Lord, I say that will have the effect of a general verdict of guilty. I desire the verdict may be recorded. I desire your lordship, sitting here as judge, to record the verdict as given by the jury. If the jury depart from the word *only*, they alter their verdict.

*Mr. Justice Buller.* I will take the verdict as they mean to give it; it shall not be altered. Gentlemen, if I understand you right, your verdict is this: You mean to say, guilty of publishing this libel?

*A juror.* No; the pamphlet. We do not decide upon its being a libel.

*Mr. Justice Buller.* You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment.

*A juror.* Certainly.

*Mr. Erskine.* Is the word *only* to stand part of your verdict?

*A juror.* Certainly.

*Mr. Erskine.* Then I insist it shall be recorded.

*Mr. Justice Buller.* Then the verdict must be misunderstood. Let me understand the jury.

*Mr. Erskine.* The jury do understand their verdict.

*Mr. Justice Buller.* Sir, I will not be interrupted.

*Mr. Erskine.* I stand here as an advocate for a brother citizen, and I desire that the word *only* may be recorded.

*Mr. Justice Buller.* Sit down, sir. Remember your duty, or I shall be obliged to proceed in another manner.

*Mr. Erskine.* Your lordship may proceed in what manner you think fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct.

*Mr. Justice Buller.* Gentlemen, if you say guilty of publishing, only, you negative the meaning of the particular words I have mentioned.

*A juror.* Then we beg to go out.

*Mr. Justice Buller.* If you say guilty of publishing only, the consequence is this, that you negative the meaning of the different words I mentioned to you. That is the operation of the word *only*. They are endeavoring to make you give a verdict in words different from what you mean.

*A Juror.* We should be very glad to be informed how it will operate.

*Mr. Justice Buller.* If you say nothing more, but find him guilty of publishing, and leave out the word *only*, the question of law is open upon the record, and they may apply to the court of the King's Bench, and move in arrest of judgment there. If they are not satisfied with the opinion of that court, either party has a right to go to the House of Lords, if you find nothing more than the simple fact; but if you add the word *only*, you do not find all the facts; you do not find in fact that the letter G. means Gentleman, that F. means Farmer, that the King, the King of Great Britain, and Parliament, the Parliament of Great Britain.

*A Juror.* We admit that.

*Mr. Justice Buller.* Then you must leave out the word *only*.

*Mr. Erskine.* I beg to ask you Lordship this question: Whether, if the jury find him guilty of publishing, leaving out the word *only*, and if the judgment is not arrested by the Court of King's Bench, whether the sedition does not stand recorded?

*Mr. Justice Buller.* No, it does not, unless the pamphlet be a libel in point of law.

*Mr. Erskine.* True; but can I say that the defendant did not publish it seditiously, if judgment is not arrested, but entered in the record?

*Mr. Justice Buller.* I say it will not stand as proving the sedition. Gentlemen, I tell it you as law, and this is my particular satisfaction, as I told you when summing up the case, if in what I now say to you I am wrong in any instance, they have a right to move for a new trial. The law is this: If you find him guilty of publishing, without saying more, the question whether it is libel or not is open for the consideration of the court.

*A Juror.* That is what we mean.

*Mr. Justice Buller.* If you say guilty of publishing only, it is an incomplete verdict, because of the word *only*.

*A Juror.* We certainly mean to leave the matter of libel to the court.

*Mr. Erskine.* Do you find sedition?

*A Juror.* No; not so; we do not give any verdict upon it.

*Mr. Justice Buller.* I speak from adjudged cases (I will take the verdict when you understand it yourselves in the words you give it); if you say guilty of publishing only, there must be another trial.

*A Juror.* We did not say so; only guilty of publishing.

*Mr. Erskine.* Will your Lordship allow it to be recorded thus, Only guilty of publishing?

*Mr. Justice Buller.* It is misunderstood.

*Mr. Erskine.* The jury say, Only guilty of publishing. Once more, I desire that that verdict may be recorded.

*Mr. Justice Buller.* If you say, only guilty of publishing, then it is contrary to the innuendoes; if you think the word King, means the King of Great Britain, the word Parliament the Parliament of Great Britain, the G. means Gentleman, and the F. Farmer, *you may say this*, Guilty of publishing; but whether a libel or not, the jury do not find.

*A Juror.* Yes.

*Mr. Erskine.* I asked this question of your Lordship in the hearing of the jury, whether upon the verdict you desire them to find, the sedition which they have not found will not be inferred by the court if judgment is not arrested?

*Mr. Justice Buller.* Will you attend? Do you give it in this way, Guilty of the publication; but whether a libel or not, you do not find?

*A Juror.* We do not find it a libel, my Lord; we do not decide upon it.

*Mr. Erskine.* They find it no libel.

*Mr. Justice Buller.* You see what is attempted to be done?

*Mr. Erskine.* There is nothing wrong attempted upon my part. I ask this once again, in the hearing of the jury; and I desire an answer from your Lordship as judge, whether or no, when I come to move in arrest of judgment, and the court enter up judgment, and say it is a libel, whether I can afterwards say, in mitigation of the punishment, the defendant was not guilty of publishing it with a seditious intent, when he is found guilty of publishing it in manner and form as stated; and whether the jury are not thus made to find him guilty of sedition, when in the same moment they did not mean to do so. Gentlemen, do you find him guilty of sedition?

*A Juror.* We do not, neither one nor the other.

*Mr. Justice Buller.* Take the verdict.

*Associate.* You say, Guilty of publishing; but whether a libel or not, you do not find?

*A Juror.* That is not the verdict.

*Mr. Justice Buller.* You say, Guilty of publishing; but whether a libel or not, you do not find—is that your meaning?

*A Juror.* That is our meaning.

*One of the Counsel.* Do you leave the intention to the court?

*A Juror.* Certainly.

*Mr. Cooper.* The intention arises out of the record.

*Mr. Justice Buller.* And unless it is clear upon record, there can be no judgment upon it.

*Mr. Bearcroft.* You mean to leave the law where it is?

*A Juror.* Certainly.

*Mr. Justice Buller.* The first verdict was as clear as could be; they only wanted it to be confounded.

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STATE *vs.* BISHOP.

(73 N. C., 44.)

PRACTICE: *Correcting illegal verdict—Evidence in larceny.*

If the jury tender an illegal verdict, the court, before it is recorded, has a right to direct their attention to it and have them render a verdict responsive to the issue.

On a trial for larceny of a \$50 bill, evidence that the prisoner two months afterwards passed a similar bill, and asked the person to whom he paid it not to tell where he got it, is admissible.

On a trial for larceny, evidence that third persons in no way connected with the case, and against whom there is no proof, had opportunity to steal the money, is inadmissible.

On a trial for larceny of a \$50 bill, where it has appeared that the prisoner had passed a similar bill, evidence tending to show that he had no means but his labor, and could not have received it for his labor, is admissible.

BYNUM, J. The defendant was indicted for the larceny of a leather trunk, the property of one W. J. Bishop. It was in proof that the trunk, when stolen in the month of October, 1874, contained one new fifty dollar bill of the Exchange National Bank of Norfolk, Va.; that the prisoner had previously been in the service of the prosecutor, as a laborer on his farm, and had occasionally waited upon the office from which the trunk was stolen, and was familiar with the locality and with the habits of the prosecutor; that he was at the time in the service of one Capehart, a mile and a half distant, and very frequently visited the prosecutor's premises, on which his father and brother lived. In the month of December following the larceny, the prisoner passed to one Charles, for small bills, a new fifty dollar bill of the same Exchange Bank of Norfolk, at the same time cautioning Charles not to use his name when passing off this bill, and that the prisoner left the county the next day for Raleigh. The evidence of the prisoner's acts and declarations, as to the fifty dollar bill, was objected to by him, and constitutes his first exception.

It was also proved by the state, that the prisoner had no means but his labor, and that he had received for his labor in 1874 but about thirty dollars. This testimony was objected to by the prisoner, and its admission makes his second exception. The prisoner offered to prove that one Bryant, who, together with other laborers, worked on the prosecutor's farm at the time of the larceny, was familiar with the locality, and had waited upon the prosecutor's office in the year 1873, and also that said Bryant, who then lived on the farm, was seen two hours after the larceny, the same night, to enter the grove of the prosecutor, in which was his house, by the least frequented of two paths leading there. This evidence was objected to by the state and ruled out, and its rejection constitutes the third exception of the defendant.

The first two exceptions are clearly untenable. In a case turning wholly upon circumstantial evidence, the acts, declarations and opportunities of the prisoner were competent, because they were the acts and declarations of the prisoner himself, who was on trial, and to exclude them would be to destroy the very foundation upon which criminals may be convicted upon circumstantial testimony.

The third exception seems to be equally untenable, as has been decided in the leading case of *State v. May*, 4 Dev., 328, followed by the *State v. Duncan*, 6 Ired., 236, and *State v. White*, 68 N. C., 158.

Bryant's guilt or innocence was not necessarily connected with the guilt or innocence of the prisoner. The crime charged upon the prisoner might be as readily committed by many as by one; both might be guilty with entire consistency. Proof of the guilt of Bryant would, therefore, not tend in the least to establish the innocence of the prisoner. The confessions of Bryant, establishing his own guilt, or even a judgment against him upon the plea of guilty, would not be competent evidence for the prisoner. The same principle extends to the acts as to the declarations of Bryant; they are all the acts and declarations of a third person not on trial, and are excluded as *res inter alios acta*, unless made competent by other direct evidence connecting Bryant with the *corpus delicti*. Testimony to any part of the *res gestæ*, constituting Bryant's alleged guilt, would have been competent and relevant, but the prisoner offered no evidence of the kind. If

Bryant had been on trial, these acts of his would have been competent against him, because they were his acts; but he was a stranger to the matter in dispute here, and his acts cannot be admitted in evidence for or against a third party.

An exception was also made to the regularity of the verdict. The jury came into court, in the absence of the counsel, and announced as their verdict, that they found the prisoner guilty of the larceny of the fifty dollar bill; when the court informed them that the prisoner was not indicted for stealing the bill, but the trunk; whereupon they retired to their room, and after consideration, came into court and in the presence of the counsel of the prisoner, rendered a verdict of guilty of the larceny of the trunk, as charged in the indictment. The objection is without force. The verdict offered was not received or recorded, nor the jury discharged. The whole matter was still in the breast of the jury, and it was entirely competent to correct an inadvertence so as to make the verdict responsive to the indictment. They certainly did not intend to acquit, but to convict the prisoner, and he has no just cause of complaint.

There is no error.

PER CURIAM:

*Judgment affirmed.*

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ESTES vs. STATE.

(55 Ga., 131).

PRACTICE: *Verdict.*

On a general verdict of guilty, on an indictment containing two counts for different offenses based on the same transaction, the law applies the verdict to the count charging the higher offense.

WARNER, C. J. The defendant was indicted for the offense of an "assault with intent to murder;" on the trial thereof, the jury returned the following verdict: "We, the jury, find the defendant guilty, and recommend him to the mercy of the court." There were two counts in the indictment. The first count charged the defendant with the offense of an "assault with intent to murder," by shooting a loaded pistol at one Henry Williams, wilfully, feloniously, and of his malice aforethought, with intent, him, the said Henry Williams, to kill and murder. The



second count in the indictment charged the defendant with the offense of "shooting at another." The defendant made a motion in arrest of judgment, on the ground that the indictment on which the defendant was tried and convicted contained, in separate counts, two separate and distinct offenses, requiring different punishments, and the jury having found a verdict of guilty generally, it is impossible to tell of what they found him guilty. On hearing and considering the motion, the court overruled it, and the defendant excepted.

This is not an open question in this court. Where an indictment contains two separate counts for offenses which may be properly joined therein, the one for a higher grade, and the other for a lower grade of an offense of the same nature, connected with, and growing out of the same transaction, though the punishment for each grade of the offense may be different, and upon the trial the jury find a general verdict of guilty, the legal intendment of such a verdict is to find the defendant guilty of the highest grade of the offense charged in the indictment. *Bullock v. The State*, 10 Ga., 47; *Dean v. The State*, 43 id., 218.

Let the judgment of the court below be affirmed.

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SEBORN vs. STATE.

(51 Ga., 164.)

PRACTICE: *Verdict as to three set aside as to two — Assault with intent to murder.*

A joint verdict as to three, erroneous as to two, against whom there is not sufficient evidence, may be set aside as to those two, and allowed to stand as to the third, against whom the evidence is sufficient to sustain the verdict.

The evidence in this case, *held* insufficient to justify a verdict of assault with intent to murder, against two of the respondents.

ABRAM SEBORN, Ned Sebourn and Sarah Sebourn, were placed upon trial for the offense of an assault with intent to commit murder, alleged to have been committed upon the person of Joe Lambert, on August 3d, 1871. The defendants pleaded not guilty.

The evidence for the state made the following case: On the day alleged in the declaration, Joe Lambert was passing down a road in Screven county, with his ox cart, when he was hailed by Abram Sebourn, v no wanted to know about "some tales he had

heard." He said whoever had insulted him, white man or black man, he had bought a pistol with which to kill him. Lambert replied that he "did say so," when Abram wheeled and shot him through the arm. Lambert caught hold of a rail and struck him. Ned Seborn, the father of Abram and Sarah, told Abram to kill him. Sarah ran up and struck him on the head with a rail. Lambert then caught Abram and Ned and held them down until they succeeded in getting up and running off. Abram turned and shot him through the thigh. Lambert then went off in his cart. He fainted when the doctor cut the ball out. He had passed the parties about one hundred yards, when Abram hailed him. They were over the fence, in the field. He did not go into the field until he was shot the first time. Followed Abram about three hundred yards into the field, trying to reach him before he could cock his pistol. Ned said, after the difficulty, that he wished he had killed Lambert; that he would have been justified in so doing.

The three defendants were introduced as witnesses, it is supposed, by consent, to avoid a severance. They testified substantially as follows:

Lambert was passing along the road, when Abram hailed him and said he wanted to see him about some news he had heard. He admitted "the news," and immediately jumped into the field and jerked a rail off the fence, swearing that he would kill Abram or Abram must kill him. Abram walked off ten steps, drew his pistol, and told him to stay off. He said, "I'll kill you to-day, or you kill me," and knocked Abram down on his knees with the rail, when the latter fired, shooting him through the arm. Before Abram could get up, he threw down the rail and jumped on him. In this condition of affairs, Sarah hit Lambert with a rail. Ned came up and told Abram to "take away his pistol." He "took away his pistol," got up and ran off about fifty yards, Lambert following him with a rail. Ned said, "Do you run, and a man trying to kill you? Shoot him again." Lambert still followed him, between four and five hundred yards to Ned's house, when he fired the second time. Abram carried his pistol to shoot rabbits. When Ned came up to the combatants, Lambert said to him, "Where are you going, you old devil, for if you come any nearer, I will kill you or Abram?" The rail with which Sarah struck Lambert was the same one used by the latter

in knocking Abram down. Ned told her to knock him again, for he would kill her father or brother.

The jury found the defendants guilty of an assault with intent to murder. They moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was overruled, and defendants excepted.

*W. Hobby, J. L. Singleton*, by *Hilliard & Harrison*, for plaintiffs in error.

*John W. Robinson*, Solicitor General, by *B. H. Hill & Son*, for the state.

MCCAY, J. 1. There is no good objection to this verdict as to Abram. If the jury believed the state's witness, he was guilty. But taking his whole testimony with the other testimony, we think there is no sufficient evidence of assault with intent to murder, against the others. To make out this offense, it must appear that had the assault caused the death of the person assaulted, it would have been murder. The evidence of the principal witness would at first seem to implicate all the defendants in the attack on him in the lane. But if it be looked at critically, it will appear that his statements on this point are not definite. He does state that they encouraged and aided Abram, but he does not state the time of their interference; and taking the statements of the other witnesses, especially the evidence of the track of the blood, it would appear that after the attack in the lane and the shooting, then Lambert got over the fence, followed Abram with a rail in his hand, and did his best to commit serious hurt upon him, and that it was during his pursuit of Abram, that the old man and the girl interfered and committed the assault he testifies to. We can excuse him for the anger which led him thus to push the war upon this foe. A man with lead in him from the pistol of an adversary may be excused at least, if in the passion thus begat, he fails to stand only on his own defense. But the law does not justify such acts, and when he crossed the fence, following Abram through his own field with a murderous weapon endeavoring to strike him, he was himself violating the law. The same charity which excuses him for the anger caused by the wound inflicted on him will, however, also excuse the old man and the girl for aiding their son and brother, when his life was in danger from the anger and the

rail of the prosecutor. Abram was retreating, he had got over the fence, got off some one hundred yards, the state's witness Lambert was after him hot with rage, and with an instrument of death in his hands. It cannot be fairly said that it was with murderous intent that the old man and the girl interfered. They had a right to interfere at that stage. Lambert had become a wrong doer, and what they did would not have been murder. Even Abram had a right to turn upon his pursuer, and had he killed Lambert, it would not have been murder. We think, therefore, the verdict as to the old man and the girl is illegal.

2. But it ought to stand against Abram. Under our system of criminal law, the principle of severance in all criminal trials is the general rule. There is no reason in the nature of things why the verdict, though set aside as to the two, should not stand as to the one really guilty. Perhaps by the common law this could not be done. Its strict rules of pleading and adherence to a theoretical accuracy in such matters, though much admired by some, is modified by our law, and we think the modification justifies the disposition we make of this case.

Judgment affirmed as to Abram, and reversed as to Ned and Sarah.

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#### CITY OF BLOOMINGTON *vs.* HEILAND.

(67 Ill. 278.)

*PRACTICE: Authority of attorney—Parol recognizance before police magistrate—Presence of respondent on trial for misdemeanor.*

H. was arrested on Saturday night, by a policeman without a warrant, for a violation of a city ordinance. The policeman, after arresting him took away his money, \$690. On Monday morning H. was brought before the police magistrate who took what was meant for a parol recognizance in the sum of \$300, to appear at two o'clock in the afternoon for trial. No bond was made nor any entered on the magistrate's minutes. H. did not come at two. The policeman, under authority of H.'s attorney, paid the city attorney, for the city, \$300 of the money in his hands. On these facts it was *held*, that the attorney had no authority to consent to this use of his client's money, and that this disposition of it was unauthorized, and H., having sued the city for the \$300, was *held* entitled to recover.

A parol promise to appear before a police magistrate has no legal validity or binding force.

On a trial for misdemeanor, it is not necessary that the respondent should be present in person, and the trial may proceed in his absence.

BREESE, J. This was an action of assumpsit, in the McLean circuit court, on the common counts, brought by Henry Heiland against the city of Bloomington, resulting in a verdict for the plaintiff, on which the court rendered judgment. To reverse this judgment the defendant appeals.

That there are three hundred dollars of the money of the plaintiff in the city treasury is not denied; the question is, Has the city, under the facts of the case, a right to retain it?

The facts, briefly stated, are, that plaintiff, a stranger, and a German, ignorant of our language, was arrested on the Saturday night of the sixth of July, 1872, by a policeman, for an alleged violation of a city ordinance, but without any warrant. He was taken to the calaboose and detained over Sunday, and, while so in confinement and under duress, the policeman took from the prisoner his money, amounting to six hundred and ninety-two dollars, three hundred dollars of which the policeman paid over to the city attorney, and he to the city treasury; of the balance, he made a special deposit in the bank.

The city claims the right to retain this three hundred dollars, on these grounds: On Monday following the event, the accused was brought before the police magistrate. The prosecution not being ready to proceed with the trial, on account of the absence of the policeman, the magistrate took what was deemed the recognizance of the prisoner in the sum of three hundred dollars, to appear at two o'clock in the afternoon, and released him.

No recognizance, such as required by law, was taken, no bond being entered into, nor was any entered on the minutes of the police magistrate. It was the mere verbal promise of the accused to be present at that hour. When the hour arrived, the accused was called, but came not; whereupon the policeman who had taken possession of the money, doubtless acting under the direction of the attorney of the accused, paid to the city attorney three hundred dollars, and he paid it into the city treasury.

It is clear, from the proof, the attorney of the accused had no authority from his principal to cause his money to take this course. He was not employed for any such purpose. The accused was under no legal obligation to appear; and, for the purpose of a trial, if the accused was legally arrested, his appearance at the trial was not indispensable. For a mere misdemeanor, as was the offense charged, he could have been tried in his absence;

and if he was found guilty, and judgment rendered against him, an execution could have been issued and levied on the money, if the parol undertaking to appear was of any binding force. But it was not of any binding force; yet, under these proceedings, of no validity, the accused was deprived of his money, and now asks the city to restore it to him. This demand, as we view the testimony and the law, is a just demand, and must be accorded to him.

It is complained by appellant that the court refused to give two instructions asked by them; the first of which was substantially embraced in other instructions given, and the second is not the law, a parol recognizance having no validity.

It is also complained that the court refused to submit these questions specially to the jury, propounded by the defendant:

*First.* Was the money in question paid over to the city by the free and voluntary direction of the plaintiff's attorney?

*Second.* Was Wm. Shackleford authorized by Heiland to act for him in relation to his defense before the police court?

This practice of propounding special questions to the jury is authorized by section 51 of the Practice Act, approved February 22, 1872. It is, however, discretionary with the court, and it might well refuse the first as it was of no importance, if the attorney had directed it, as he had no authority to give such direction; and as to the second, an authority to act in defense of an accused party confers no authority to appropriate his money, and it would have answered no good purpose had the jury returned special answers to these questions.

It is apparent from the record, that the city has the money of appellee which, *ex æquo et bono*, they ought not to retain, and the verdict and judgment are right.

The judgment must be affirmed. *Judgment affirmed.*

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GRIGG vs. PEOPLE.

(31 Mich., 471.)

PRACTICE: Arraignment and plea — Record.

It must affirmatively appear by the record of a criminal case, that there has been an arraignment and plea, or the verdict will be set aside on writ of error.

ERROR to Wayne Circuit.

*S. Larned and Michael Firnane*, for plaintiff in error.

*Andrew J. Smith*, Attorney General, for the people.

GRAVES, C. J. The plaintiff in error was informed against in the Wayne circuit court, for the larceny of two horses. The value of each was laid above one hundred dollars. He was convicted and sentenced to the house of correction for one year from the 27th day of January last. Complaint is made that the sentence, as recorded, does not rightly describe the offense, and also that the action of the court in vacating an order, which had been granted for a new trial, was unwarranted. But as there is another objection, which is certainly fatal, these points will be passed over.

It is alleged for error, that there was no arraignment upon the information, and that no plea was made by the prisoner or entered by the court. The return to the writ of error is silent on the subject, and the attorney general, whilst admitting that an arraignment and plea were indispensable, as of course they were, submits to the court whether the absence of any express matter in the record as returned, to show the contrary, it ought not to be intended that both proceedings were actually had.

An arraignment and plea being steps imperatively required, the recital of them, if they were taken, was a necessary ingredient of the record. They were required to be duly entered, and it was the duty of the court below, in obedience to the writ of error, to certify here the whole record in the exact shape in which it remained there. This appears to have been done. We even find some matters in the return not upon common law strictness, components of the record, and we have the certificates of the clerk that a true and correct copy is given of all the proceedings had in the cause. No application has been made for any further or different return, and we must consider that the return made is as full and complete as the record below; and if in any such case it would be admissible to assume that the fault was caused by the failure of the lower court to have the proper entries of real proceedings made, either as they occurred or afterwards by amendment, and not by the omission of the proceedings themselves, the face of the present return will not warrant any such presumption. Two motions for a new trial appear

*affirmed.*

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to have been made and passed on after argument, and the case must have undergone such a sifting as to apprise the court of the defects, and to have suggested the need for an amendment of the record if the difficulty consisted of the want of entries and not of facts.

Under the circumstances, we must take the record as we find it returned, and assume that it tells neither more nor less than what occurred.

The omissions, then, are sufficient to support the allegations of error. No better evidence to maintain them, if well founded, could regularly be produced. An express statement that in fact there was no arraignment and plea, it is not the province of anyone to make and insert. Negative evidence is that only which seems practicable.

The sentence and conviction must be set aside, and the plaintiff in error must be remanded to the sheriff of Wayne county, that he may be lawfully arraigned on the information, or otherwise dealt with agreeable to law.

COOLEY and CAMPBELL, JJ., concurred.

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AYLESWORTH vs. PEOPLE.

(65 Ill., 301.)

PRACTICE: *Record—Arraignment and plea.*

It must affirmatively appear on the record that an indictment was returned into court.

It must affirmatively appear on the record that the respondent was arraigned and pleaded to the indictment.

MCALLISTER, J. This was an indictment in the Warren circuit court, for selling liquor without a license, and verdict of guilty, and fine imposed. The defendant brings the record to this court by writ of error.

The record purports to contain an indictment against plaintiff in error, but it wholly fails to show that such indictment was ever presented in court by any grand jury, or that plaintiff in error was ever arraigned upon or pleaded to it. The record must show that the indictment was returned into open court. *Gardner v. The People*, 20 Ill., 430; *Sattler v. The People*, 59 id., 68.

The record should also show that the plea of not guilty was entered. Without it there is nothing for the jury to try. *Johnson et al. v. The People*, 22 Ill., 314.

The judgment of the court below must be reversed, and the cause remanded. *Judgment reversed.*

## EISENMAN vs. STATE.

(49 Ind., 520.)

PRACTICE: Arraignment and plea.

On the trial of an appealed criminal case, where the defendant was arraigned and pleaded before the justice, it is not necessary that there should be a new arraignment and plea in the appellate court.

WORDEN, J. This was a prosecution against the appellant before a justice of the peace, for selling intoxicating liquor to a person who was, at the time, in a state of intoxication. Before the justice, the defendant was arraigned upon the affidavit, and pleaded not guilty thereto; and, upon trial, was convicted. He appealed to the circuit court, where, upon trial, he was again convicted.

The only point made by counsel for the appellant is, that in the circuit court he was not arraigned, and did not plead to the affidavit. The record shows that in the latter court the defendant appeared in person, as well as by attorney, and that the cause was submitted to the court for trial.

We need not decide what would have been the effect of a failure to formally arraign the defendant and require him to plead, had the prosecution originated in the circuit court. As the prosecution originated before a justice of the peace, and as the defendant was there arraigned and pleaded guilty to the affidavit, any further arraignment and plea were entirely unnecessary. The defendant was properly tried on the affidavit, which was filed before the justice of the peace. *Wachstetter v. The State*, 42 Ind., 166; *O'Conner v. The State*, 45 id., 347. On this affidavit he had already been arraigned, and to it he had already pleaded.

The judgment below is affirmed, with costs.

DAVIS *vs.* STATE.

(38 Wis., 487.)

## PRACTICE: Arraignment and plea — Record.

Where it does not affirmatively appear from the record that defendant was arraigned and pleaded before verdict, a conviction will be reversed on error, and this rule applies to cases of assault and battery.

After verdict, the court has no power to have a plea entered *nunc pro tunc* for the defendant without his consent.

## ERROR to the Circuit Court for Iowa County.

The plaintiff in error was prosecuted to convict before a justice of the peace for assault and battery. He pleaded to the circuit court, where he was again tried and found guilty by the jury. The return of the justice fails to show that he pleaded or refused to plead to the complaint in the justice's court; and the record shows that he did not plead or refuse to plead thereto in the circuit court. On the ground that he had never pleaded or been called upon to do so, and on other grounds which need not be stated, he moved in arrest of judgment in the circuit court. That court denied the motion, and after ordering that a plea of not guilty be entered *nunc pro tunc*, rendered judgment upon the verdict.

*Wilson & Jones*, for plaintiff in error, to the point that the court cannot supply an issue after verdict in a criminal action, cited Whart. Cr. Law, 530; *Peters v. The State*, 3 G. Greene, 74; *State v. Hughes*, 1 Ala., 655.

*The Attorney General*, for the state.

LYON, J. This case is ruled by that of *Douglass v. The State*, 3 Wis., 820, in which it was held that a verdict in a criminal case where there has been neither arraignment nor plea is a nullity, and no judgment can be rendered thereon. The learned attorney general concedes this to be so, unless (quoting his language): "1. That decision should be held not applicable to a simple assault and battery; or 2. That error was cured by the order entering the plea *nunc pro tunc*; or 3. The statute of 1871, ch. 137, sec. 30, cures the defect. (Tay. Stats., 1942, § 17.)"

In *Douglass v. State*, the offense charged in the indictment was for erecting and maintaining a nuisance. Like a simple assault and battery, this was a mere misdemeanor, and we do

not perceive how any distinction can be made in the two cases in respect to the necessity of a plea.

Neither do we think that the defect was cured by the entry, after a verdict, of a plea *nunc pro tunc*. We have been referred to no authority which supports the opposite view, and are not aware of any rule of criminal practice which supports it. And it may be further observed that the jurors' oaths prescribed by statute are framed on the hypothesis that the issue is to be made up before trial. The jury in the circuit court were sworn to "well and truly try *the issue*" between the state and the plaintiff in error according to the evidence. R. S., ch. 179, sec. 4. When the jury were so sworn, and when the verdict was rendered, there was no issue of record to try. The form of the jury oath in the justice's court is somewhat different, but the import is believed to be the same. R. S., ch. 121, sec. 16.

The statute of 1871, cited by the attorney general, does not reach the case. It provides for correcting certain errors or mistakes in the record by amendment. The plea ordered by the court to be entered is not, in any correct sense, an amendment. The court, by its order, did not attempt to amend anything, but to supply, after verdict, an entire proceeding, which should have been taken before trial, and which was essential to a proper trial.

The case of *State v. Cole*, 19 Wis., 129, is not an authority for sustaining the practice adopted by the circuit court in the present case. It appears in the report of that case, that "after the jury had been impaneled and sworn, the defendant was put to plead, and pleaded not guilty." In a head note it is said that this was not error. But so far as the report shows, the point was not argued or decided. It became of no importance after the court awarded a new trial on other grounds. We do not decide the precise point here. We only hold that after verdict, it is too late to order a plea to be entered for the defendant in a criminal case without his consent, and then to render judgment on the verdict.

*By the Court.*—The judgments, both of the circuit court and the justice, are reversed.

STUBBS *vs.* STATE.

(49 Miss., 716.)

PRACTICE: *Presence of respondent during trial — Record.*

Judgment will be reversed where the record does not affirmatively show that the respondent was present throughout the trial and when the verdict was rendered.

TARBELL, J. The plaintiff in error was indicted, tried and convicted of the crime of murder. The only point made here is, that the record does not show, affirmatively, the presence of the accused throughout the trial, and particularly that it does not show his presence when the verdict of the jury was returned, nor when the motion for a new trial was made and overruled.

The record states the presence distinctly, of the accused, on each day of the trial, down to the 19th day of October, 1872, the twelfth day of the term at which the trial was had, on which last day the entry is this: "Saturday morning, eight o'clock, October 19th, 1872. Court met pursuant to the adjournment of yesterday. Present, the same as yesterday; the Hon. URIAH MILLS presiding."

The entry on the 18th, or the day previous to the foregoing, was as follows: "This day comes the district attorney, who prosecutes on behalf of the state of Mississippi; and the said defendant, being brought into open court and placed at the bar thereof, and also appearing by his counsel."

One question is, whether the entry of the 19th, to wit: "Present, the same as yesterday," is an affirmative statement of the presence of the accused. Can *his* presence be *inferred*, even from that entry? Does the entry import more than the presence of the court and the usual officials? As to the motion for a new trial, the record says: "And afterwards, to wit, on the 26th day of October, 1872, being the eighteenth day of the term, the following proceedings and orders were had and entered on the minutes of said court, to wit:" Then follows the motion, beginning with the title of the cause, and proceeding thus: "The *defendant* moves the court for a new trial," on the following grounds, which are given and signed by counsel. The motion was overruled, and then, on the same day, follows this entry: (Title of the cause.) "This day comes the district attorney, who

prosecutes on behalf of the state of Mississippi. And the said defendant, being brought into open court placed at the bar thereof, and caused to stand up," etc., when sentence was pronounced.

Does the record show, affirmatively, or even inferentially, the presence of the accused, pending the motion for a new trial? Is his presence necessary on a motion between verdict and sentence?

The questions raised on the face of the record are certainly very technical, and as the attention of the court below was not called to the points now made, they would not be entertained except in higher grades of crime. 1 Bish. Cr. Pr., §§ 422-428; id., § 638, *et seq.*; id., §§ 827, 829, *et seq.*; *Dyson v. The State*, 26 Miss., 364; Code, §§ 2799-2805; id., § 2884; *Scaggs v. The State*, 8 S. & M., 722.

If evidence was submitted to the jury on the day the verdict was rendered, as the record appears to state, then a constitutional right was denied the accused. Const., art. I, § 7. On this point the record is indistinct.

Another and material rule is this, that the verdict in cases of felony must be delivered in open court, and in the presence of the prisoner. 1 Ch. Cr. L., 636. This rule, say the court, in *Price v. The State*, 36 Miss., 531, "is founded on two reasons; first, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors; and secondly, in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court; but, under our law, he may waive that right. If he is not in custody, so as to be deprived of the power to attend, it would seem that the reason of the rule as to his right to be present would fail; for he is voluntarily absent when he ought to be present, and cannot complain of the consequences of his own voluntary act." The voluntary absence of the defendant in that case was held to be a waiver of his right to be present, he being under recognizance, and the court said: "His own illegal act should not be permitted to thwart the process of the law to his advantage." He was present at the opening of the trial, and voluntarily absented himself at the rendition of the verdict.

In the case at bar, the accused was in the custody and subject to the orders of the court.

*Scaggs v. The State*, 8 S. & M., 722, is quite analagous to the case under consideration. It was insisted in that case, as in this, that the point made in the appellate court was not raised in the court below. The court say: "The error which first protrudes itself to notice is the circumstance that it does not appear that the prisoner was present during the whole of the trial of the indictment. The only evidence of his presence at all is contained in a bill of exceptions, where he is stated to have asked some questions of a witness, but he does not appear to have been confronted by the witness against him, which was his constitutional right. Const., art. 1, sec. 10.

"It must appear, in this class of crimes, that the accused was present during his trial, or it will be error. The presence of the prisoner cannot be inferred, but must appear affirmatively, and, for all that appears in this record, the questions directed to the witness by him might have been propounded in writing."

The rule declared in *Scaggs v. The State* is repeated in *Dyson v. The State*, 26 Miss., 383, the court in the latter case saying: "that the record must affirmatively show these indispensable facts, without which the judgment would be void — such as the organization of the court; its jurisdiction of the subject matter, and of the parties; that a cause was made up for trial; that it was submitted to a jury sworn to try it; that a verdict was rendered and judgment awarded." And it is added, that "out of abundant tenderness for the right secured to the accused by our constitution, to be confronted by the witnesses against him, and to be heard by himself or counsel, our court has gone a step further, and held that it must be shown by the record that the accused was present in court pending the trial." This, it is further said, is upon the ground of the peculiar sacredness of this high constitutional right.

In *Wolf & George v. Martin*, 1 How., 30, it is declared to be "an acknowledged principle that nothing can be presumed for or against a record except what appears substantially upon its face."

This rule is explained, in *Dyson v. The State*, to have reference "to those indispensable requisites necessary to the validity of the record as a judicial proceeding," and that it has "no appli-



education to those incidental matters which transpire during the progress of the proceeding in court."

As to the necessity of the presence of the accused pending the trial, see *Kelly & Little v. The State*, 3 S. & M., 528; 12 Wend., 344; 7 Cow., 525; 13 Gratt., 763; 7 Ohio, pt. 1, 180; 6 Barr., 584; 6 Ired., 164; 5 Pike, 431; 10 Mod., 248; 19 Johns., 39; *Prim v. Commonwealth*, 6 Har. (Pa.), 103; 1 Park. C. C., 474; *Rex v. Harris*, 1 Ld. Raym., 267; 4 Har. (Pa.), 129; 31 Me., 592.

The rule that the accused in cases of felony must be present in person pending the trial, and that this must be affirmatively shown by the record, as we have seen, is not an open question in this state. See cases cited herein.

Running through all the authorities with regard to this rule, there is a clear distinction between felonies and misdemeanors. 1 Bish. Cr. Pr. § 684, *et seq.*; 25 Vt., 93; 19 Ark., 214; Sprague, 227; 4 Cal., 238; 1 Curtis, C. C., 433; 3 S. & M., 518; 2 Hilt., 523; 16 Vt., 497; 2 C. & P., 413; 1 Salk., 55; 12 Wend., 344; 3 Denio, 98; 1 Va. Cas., 172; 1 Parker, C. C., 360; 3 Burr., 1786; 4 Har. (Pa.), 129; 7 Cow., 525; 2 Den. C. C., 459; 6 Eng. L. and Eq., 352.

As to the application of the rule to motions between verdict and sentence, there is some diversity in the adjudications to the extent, that a simple question of law may be argued in the absence of the accused, but the better opinion is, that the rule should be adhered to in felonies from the arraignment to the final sentence. 1 Bish. Cr. Pr. § 685; 14 Ind., 573; 1 Ch. Cr. L., 492; 10 Har. (Pa.), 94; 9 Cal., 115; 1 Bish. Cr. Pr. § 692.

The result in this, as in many similar cases, is, of course, in consequence of the neglect of the clerk, through his inexperience or other cause. Hence, a special obligation devolves on circuit judges and district attorneys to see that the entries of their proceedings are properly made. A careful observance of this duty would leave causes to be determined upon their merits.

When the life or liberty of a human being is involved, there are "indispensable requisites," as stated in *Dyson v. The State*, which can not be overlooked by an appellate court. The observance of which can not, according to the authorities cited, be inferred or presumed. The cost and trouble to the state, and to parties, caused by defective records, is very considerable, and this expense, might, possibly, be not unjustly cast upon inatten-

tive clerks. If not corrected by these admonitions, legislation may become indispensable.

The judgment in this case will be reversed, but the accused will be detained in custody, subject to the action of the proper court.

Judgment reversed, cause remanded, and a new trial awarded.

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WILSON vs. COMMONWEALTH.

(10 Bush (Ky.), 526.)

PRACTICE: *Proceedings on appeal after prisoner's escape.*

Where the prisoner has escaped and remains at large while appeal proceedings are pending, the court will on motion of prosecution dismiss the appeal.

COFER, J. The appellant, having been found guilty of the crime of murder and sentenced to be confined in the penitentiary for life, obtained leave to apply to a judge of this court for an order granting an appeal; and it appearing to the court before which he was tried, that there was danger that he would escape from the jail of that county, the sheriff was ordered to transfer the appellant to the jail of Jefferson county for safe keeping. On the way from one jail to the other, appellant jumped from a window of the car in which he was being transported, and made his escape, and is now at large.

The appeal having been granted, the attorney general has entered a motion, based on an affidavit of the deputy sheriff, from whose custody the appellant escaped, to dismiss the appeal on the ground that as appellant is not in custody to abide such judgment as may be rendered, he has no right to prosecute the appeal.

It seems to us clear, both upon principle and authority, that the motion ought to be sustained. The court ought not to do a nugatory act; yet if we proceed to try this appeal, the appellant cannot be compelled to submit to our decision if it should be against him, and ought not therefore to be allowed to reap the benefit of a decision in his favor. He might thus be enabled to defeat the ends of justice entirely, for he may be able to keep beyond the reach of the officers until by the death or removal of witnesses or other causes, his conviction upon a second trial

would be rendered improbable, if not impossible. As he has chosen to undertake to relieve himself by flight, in contempt of the authority of the court and of the law, he cannot also invoke the aid of this court.

In *The State v. Rippon*, 2 Bay, 99, it was held by the supreme court of South Carolina, that wherever corporal punishment was either probable or certain, the defendant should be in the power of the court before they proceeded to hear a motion for a new trial; and the court refused to hear an argument on the motion, but directed that a bench warrant be issued, that the defendant might be arrested and punished pursuant to the judgment.

In *Rex v. Teal and others*, 11 East, 307, two persons were jointly indicted for a misdemeanor, and were tried together and convicted; and upon an offer by one of them, who was then in court, to move for a new trial, the court inquired if both were present, and being informed that one was absent, refused to permit the motion to be made, because a new trial could not be granted to one without granting it to the other also.

The motion is sustained and the appeal is dismissed.

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MOORE vs. STATE.

(44 Tex., 595.)

PRACTICE: *Proceedings on appeal after prisoner's escape.*

Where the prisoner has escaped and remains at large while appeal proceedings are pending, the court will, on motion of the prosecution, dismiss the appeal, but not until a reasonable time has elapsed for the capture or surrender of the prisoner.

MOORE, J. At the July term, 1873, of the district court of Fayette county, the appellant, Robert Moore, was convicted of the crime of rape, and adjudged to be confined in the penitentiary for the period of twenty-five years. But, having prayed for an appeal to this court, sentence on the judgment was stayed, and he was committed to jail, as required by law in cases of felony, where the defendant appeals, until the decision of this court could be rendered in said appeal. The transcript of the record was filed in this court September 23, 1873. On the 13th day of

February, 1874, the case coming on to be heard by this court in the regular call of the docket, and no appearance being made for appellant, the attorney general suggested that appellant had escaped from the jail of said Fayette county, to which he had been committed as aforesaid, pending his said appeal, on the 17th of October, 1873, as shown by the affidavit of the sheriff of said county accompanying said motion, and moved the court, on account thereof, to dismiss said appeal. This motion, after due consideration, was however overruled.

It has been the uniform practice of this court, since the enactment of the law requiring defendants in cases of felony to be committed to jail pending their appeals, to refuse to consider such appeals, unless at the instance of the state, when the appellant has escaped from the custody to which, as required by law, he has been committed. The appellant will not be heard to question the correctness of the judgment while in flagrant violation of the authority of the court, and when he has broken the condition upon which he was authorized to take an appeal. But although the court has always refused to permit appellants to appear by counsel, and have their appeals heard and decided under such circumstances, it has never held that the mere fact of an appellant's escape from jail forfeits the appeal. It suspends the right to prosecute it, but does not abrogate the jurisdiction of this court on it. And if the appellant should be recaptured, or voluntarily return and surrender himself to the custody to which he was committed, he might then ask to be heard, and the court will consider the appeal, and if the judgment is found to be erroneous it will be revised.

But undoubtedly there must be some period of time after which the court will not suffer its docket to be incumbered and the business of the court to be impeded with appeals by parties who are contemning and defying the law in virtue of which they claim the right to bring their cases to this court. If, after a reasonable delay, of which the court must judge from the character and circumstances of the case, the appellant fails to surrender himself to legal custody, so that the court may properly proceed to the disposal of the case on its merits, it must regard and treat the appeal as voluntarily abandoned and strike it from its docket.

There has, we think, quite sufficient time elapsed in this case

since appellant's escape for the court to make a final disposition of it. And as a submission of the case on its merits is not asked by the state, and it is not shown that appellant has been recaptured, or has voluntarily surrendered himself into custody, and no appearance has been made for him in this court by counsel, his appeal, in our opinion, should now be dismissed. And it is accordingly so ordered.

*Dismissed.*

LINE vs. STATE.

(51 Ind., 172.)

PRACTICE: *Change of venue — Alibi — Erroneous charge.*

A defendant can have but one change of venue for the same cause in the same case, and when he has had the case removed from one judge on the ground of bias and prejudice on the part of such judge, he cannot have it removed from another judge on the same ground.

A charge that "evidence of an *alibi* is evidence of a suspicious character" is error.

It is error to refuse to charge that in a criminal case, the defendant is presumed to be innocent, and before he can be convicted the state must prove his guilt beyond a reasonable doubt.

BIDDLE, C. J. Indictment for larceny in stealing a horse.

It appears from the record that the Hon. Bernard B. Daily, the judge of the court, had been employed, before his appointment, as counsel for the appellant, and for this reason was incapacitated from trying the case. He therefore called the Hon. Edwin P. Hammond to preside on the trial. The appellant moved for a change of venue from Judge Hammond, founded on his affidavit, on account of the alleged bias and prejudice against him. The motion was granted. Thereupon, Judge Daily called the Hon. Edward C. Buskirk to try the case. The appellant then filed his affidavit, alleging the bias and prejudice of Judge Buskirk against him, and moved again for a change of venue from the judge. This motion was overruled, and exception taken.

The affidavit, we think, fulfills the requisites of the statute; but the question arises, Is the appellant entitled to two changes of venue in the same case for the same cause? We think not. The

statute nowhere authorizes a second change of venue to the same party for the same cause. The court had no more power to grant a second change than it would have to grant a third, fourth, or fifth, or any number of changes. The ends of justice demand this construction of the statute, otherwise it would be in the power of a defendant, charged with a criminal offense, to defeat a trial entirely.

After the overruling of the motion for a change of venue from Judge Buskirk, the appellant was arraigned, and pleaded not guilty to the indictment. A jury trial was had, which resulted in a verdict of guilty. A motion for a new trial was made, causes filed, motion overruled, exception taken, and appeal to this court.

At the proper time, the state moved the court to instruct the jury as follows: "7. Evidence of an *alibi* is evidence of a suspicious character, and should be most rigorously sifted, and cautiously confided in; but when it has been subjected to severe scrutiny, and ascertained to have been honestly and truthfully given, it should have equal force, with the same weight of evidence on any other subject."

The motion was sustained, the instruction given to the jury, and exception taken by the appellant.

It seems to us that this instruction is erroneous. Why evidence of an *alibi* should be regarded as suspicious, as a rule of law, any more than evidence of any other defense, we cannot perceive. Suspicious evidence is a fact for the jury to consider, not a rule of law applicable in all cases to the defense of *alibi*. Such a defense may be supported by unsuspicious evidence, and as honestly made as any other, and is often the only shield of innocence. And we think whatever defense a defendant may lawfully make should not be subject to any suspicion, unless the evidence in the case warrants it. There is a presumption of law, in certain cases, against the full credibility of evidence, as, where the witness testifies on his own behalf, or on behalf of his near kindred, or of those in close relations of love and affection to him, or where he is interested. In such cases, the rule of law is founded on the uniformity of human nature in its disposition to favor and shelter those it loves, and to protect its own interests. We know of no such rule against witnesses because they happen to testify concerning an *alibi*. The credibility of witnesses must, in all cases, be left to the jury, whatever may be the subject

about which they testify. Suspicion, falsehood or fraud are never presumed; they must be shown by evidence.

There is also a class of cases wherein presumptions will arise against a defendant, as, when a larceny has been committed, and the stolen goods are found, immediately or soon thereafter, in the possession of the defendant, or when counterfeiting tools are found upon the person arrested for passing counterfeited money; but we know of no presumption or suspicion, as a rule of law, against the evidence or the witnesses of a defendant, merely because he attempts to prove an *alibi* in his defense.

In the case of *Allison v. The State*, 42 Ind., 354, this court expressed the following rule, to which we adhere :

"When the trial of a criminal case is by jury, the court should not lay down any arbitrary rules as to the weight they are to give to the evidence which has been adduced. They are the judges of the facts, and must be left to weigh the evidence and consider the motives of the party, without any rules for the court which will compel them to indulge a presumption of fact, whether, under all the circumstances, they think they ought to indulge it or not."

If it should be thought that the case of *Howard v. The State*, 50 Ind., 190, conflicts with this view in the statement of the instructions, it will be noticed that the case was decided upon another ground.

This court has frequently held that sufficient evidence of *alibi* to create a reasonable doubt in the minds of the jury, of the defendant's guilt, should result in an acquittal. *Adams v. The State*, 42 Ind., 373; *West v. The State*, 48 id., 483; *Bimes v. The State*, 46 id., 311; *Kaufman v. The State*, 49 id., 248.

The appellant, at the proper time, asked the court to instruct the jury as follows:

"6. In a criminal case, the defendant is presumed to be innocent of the crime with which he is charged; and before he can be convicted of the crime with which he is charged, the state must prove him guilty of the crime, beyond a reasonable doubt."

This instruction was refused by the court, and exceptions taken by the appellant.

We think the refusal of this instruction was error. 2 G. & H., 415, sec. 104; *Long v. The State*, 46 Ind., 582.

The omission to give this instruction was, doubtless, an over-



sight in the learned judge who tried the case below, but so the record is made up.

There are several other instructions asked by the appellant, and refused by the court, which express the law, but as they were given by the court on its own motion, in substantially the same words, the refusal was not erroneous. But as to the sixth instruction, above, we may say, as was said by OSBORN, J., in the case of *Long v. The State, supra*, that "we have carefully examined all the instructions, and find that the second branch of that asked and refused had been substantially given, but they were silent as to the presumption of innocence. The court should have charged the jury on that subject, as asked, and an error was committed by its refusal to do so."

The judgment is reversed, cause remanded, with directions to sustain the motion for a new trial, and an order to return the prisoner.

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#### HAMILTON vs. PEOPLE.

(29 Mich., 173.)

**PRACTICE:** *Preliminary examination — Information — Misjoinder of counts — Motion to quash — Evidence — Motive — Cross-examination — Contradicting witness is to his interest — Impeachment of witness — Privileged questions — Irresponsive answer — Impeaching question — Testimony of accomplice — Province of court and jury as to questions of law — Presumptions of fact.*

- A plea in abatement to an information filed by a prosecuting attorney, based upon the return made to the circuit court by a committing magistrate, which alleges that a part of the examination was had on a legal holiday, is bad.
- A preliminary examination for the purpose of holding to bail is not a judicial proceeding, and mere irregularities do not vitiate it.
- A motion to quash a whole information, because it contains some objectionable counts, will not prevail where there are some counts to which there is no legal objection. The motion to quash should specify the bad counts.
- A motion to quash an information on the ground of misjoinder of counts is addressed to the discretion of the court, and is not reviewable on writ of error.
- On the trial of an information charging the burning of property with intent to defraud insurers, evidence which tends to show a motive is admissible.
- A statement by one respondent, made the day after the commission of the crime, is not admissible against his co-respondent, although it had appeared that there was a conspiracy between them to commit the crime.

The respondent has a right, on cross-examination of a witness for the prosecution, to draw out from him evidence which tends to contradict material evidence which has been given by another witness for the prosecution.

Where an accomplice volunteers to testify, in a criminal case, he must testify fully, and may be compelled to testify as to statements made by him to his counsel with regard to the case, and it seems that the counsel may also be compelled to testify as to such statements.

It is proper to ask a sustaining witness, on cross-examination, whether he had said he would not believe the impeached witness under oath.

It is proper to ask an impeaching witness, who has testified to the bad reputation of an impeached witness for truth and veracity, whether from that reputation he would believe the impeached witness under oath.

On the separate trial of one defendant on an information, some counts of which charge him jointly with the others, and some of which do not charge the offense jointly against all, the jury should not be allowed to consider any count in which all are not jointly charged.

What credit is to be given to the testimony of an accomplice, whether corroborated or uncorroborated, is a matter exclusively within the province of the jury.

On the trial of a criminal case, the jury are not judges of the law, but it is the duty of the jury to accept and act upon the law as given them by the court.

There is no presumption of fact which is not entirely within the disposal of a jury in a criminal case.

#### ERROR to *Calhoun Circuit*.

*Brown & Patterson* and *M. S. Brackett*, for plaintiff in error.  
*Byron D. Ball*, Attorney General, for the people.

CAMPBELL, J. The defendants were indicted for burning a barn, with intent to defraud an insurance company. The conviction was had of this plaintiff in error (defendants below being tried separately) upon the testimony of William Fuller, who was sworn as state's evidence. Questions arose below on some preliminary matters, and upon the sufficiency of the information, as well as on points ruled at the trial.

A considerable part of the record is taken up with the various rulings and proceedings upon pleadings in abatement, which preceded the issue of not guilty.

The plea relied upon was, in brief, that the complaint before the justice of the peace was brought on for examination on the 21st day of February, A. D. 1872, and after it had partly completed it, was adjourned until the 22d, when some further testimony was taken, and an adjournment was had until the 23d, and thereafter the proceedings went on to completion. The ob-

jection relied on is, that the 22d of February being not a law day, the justice lost jurisdiction.

This is all that appears in the original plea; and admitting it to be true, and without reference to the subsequent proceedings at the circuit on either side, we do not think it can be sustained.

The justice in these examinations does not act judicially, in the technical sense, but in his capacity of a conservator of the peace, and the proceeding is one which, at common law, was conducted very much at discretion. It is possible that the regularity of the arrest and continued custody of the prisoners may have been open to question; but we have found no authority for holding that a criminal examination before a justice is void, if a complaint has been made before him on oath, and the accused are finally held to bail or committed on a law day, upon testimony taken in their presence in pursuance of it. Whether irregular or not, we find no authority for regarding such proceedings as nullities. We can see no reason why a complaint properly verified should cease to be valid to maintain an examination, unless the parties accused are either discharged or held to commitment, so long as there is no substantial break in the proceedings. No formal record is required to be kept of them, and the continuance from day to day is not an adjournment of such a nature that the failure to announce it would be of any consequence. The proceedings are by the statute contemplated as continuous, unless formally adjourned from time to time, and the close of business on one day would carry it over until the next business day, as a matter of course, unless otherwise ordered. The adjournment to the 22d, if illegal, would not interrupt the legal course, which would take the matter over to the 23d; and whether the justice did or did not consider some testimony which was not admissible because irregularly taken, his discretion in ordering the commitment cannot be reviewed in any such way as proposed here.

The plea does not dispute the fact that there was a preliminary examination upon a proper complaint before a magistrate having jurisdiction, resulting in a commitment; and this, we think, was all that was necessary to justify proceeding by information.

A motion was made to quash the information, resting mainly on the misjoinder of counts, the insufficiency of some of them,

and the want of a preliminary examination upon some of the charges.

It was held in *Washburn v. People*, 10 Mich., 372, that the fact of examination need not be alleged in the information, but that the objection must be made by motion to quash, or plea in abatement. It is not claimed by the motion that there was no examination, but only that it did not cover all the counts; and the counts objected to for that reason are not specified. As the motion to quash the whole information could not properly prevail on this ground, and the parts objected to are not specified, we think that objection was not tenable in the form resorted to. The question of misjoinder is more serious, and rests on different grounds.

The complaint before the magistrate and the information are both so confused and multifarious that the court below might very properly have declined to compel defendants to go to a trial. We have seldom seen pleadings so fairly open to criticism on this head. Offenses are charged to which all the defendants could not possibly be amenable. Some counts charged no offense at all; others contain the charges upon which we suppose the trial was really had, and upon these there is, we think, no fatal objection, as the rules of criminal pleadings under our statute justify the introduction of various counts charging the ownership of the property burned, and the position of the respondents as principal or accessorial offenders in different ways. See *Annis v. People*, 13 Mich., 511.

It is intimated in *The King v. Kingston*, 8 East, 41, that a demurrer would not lie to the whole information for such a misjoinder; but that the proper remedy was by motion to quash. Such a motion is addressed to the discretion of the court. It ought to be granted where the confusion is such that it is likely to interfere with the means of defending, by misleading or perplexing the prisoner in meeting the case or preparing for trial. But when the court can prevent any mischief, as it usually can, by confining the proof to the single transaction on which the defendant was examined, or on which the prosecution has opened the testimony, or by compelling an election in the outset, no wrong is done by the refusal to quash.

We do not hold that, under our statutes, requiring a motion to quash in lieu of a motion in arrest or to save a ground of

error, such a motion is always discretionary. But such a motion for misjoinder appears to be discretionary. 1 Bish. Cr. Proc., § 447; *The King v. Kingston*, 8 East, 41.

Where the various counts may all refer to the same transaction, the safer course usually is, undoubtedly, not to quash, but to regulate the proof on the trial as far as may be necessary to prevent surprise or the misleading of the prisoner, and to confine it to that transaction. See *Rex v. Young*, R. & Ry., 280 (n.); *Rex v. Ellis*, 6 B. & C., 145; *Anonymous*, 2 Leach C. C., 1105.

We had occasion at the last term to consider and sustain the propriety of allowing proof of the entire transaction, in *People v. Marion*, and *Van Sickle v. People*.

We think there was no ruling below which we can properly review, which rendered it erroneous to put respondents to their trial, although the misjoinder was gross and improper.

The court on the trial regarded the case as one where the offense was that of burning property with intent to defraud insurers; and it was tried entirely on that theory. The questions raised and discussed on the exceptions and charge are to be considered in view of such a state of facts.

The theory of the prosecution depended entirely on the evidence of the respondent Fuller, who swore to a plan, made in advance, to burn the barn in question by putting a lighted candle in a place where, as it burned low, it would reach litter and other combustible material, and set it on fire. It was to operate like a slow match. There is no direct evidence of the guilt of any of the defendants, but they were convicted on circumstantial evidence, which derived its force chiefly as explained by Fuller's testimony concerning the previous arrangement. With that out of the case, or discredited, no conviction could have been justified.

The first ruling objected to and mentioned on the argument, related to the admission of certain chancery records, showing that in 1869, a bill was filed to rescind the conveyance of the land on which the barn was situated. The ground set up in the bill was fraud alleged to have been practiced by Thomas W. Hamilton and one Nathaniel Badger. The object of this testimony was claimed to be to establish a motive to account for the destruction of the property, by showing a dispute affecting title.

It was admitted against the objection, and the court afterwards refused to strike it out.

We are inclined to think that evidence of an existing controversy of that sort would have some bearing on the question of motive, although there may be difficulty in guarding it so as to prevent the jury from passing upon the facts of that controversy, which could not lawfully be done. But it appeared from these files that the case was brought to an issue on bill, answer and replication, more than a year before the fire, and that no proof had been taken. As it was then too late to take proofs, and the answer denied the equity of the bill, and, therefore, as the case then stood, the defendants were vindicated, we can see no reason for permitting the bill to be introduced; and allowing it to be received as evidence that respondents had a motive to burn the insured property was injurious and erroneous. Still more objectionable was the introduction of foreclosure proceedings commenced after the fire, which could, under no circumstances, furnish proof of a motive. The condition of the title at the time of the fire was open to proof more directly, and could not properly be shown in this way. No other legitimate inquiry could have been aided by any proceedings *ex post facto*.

Objection was made to the reception of certain evidence of the amount of hay in the barn, that there was no valid count charging the burning of anything but the barn, and that respondents had not been examined upon such a charge. We think that the fact of the fullness or emptiness of the barn might have a very clear bearing upon the question of motive in burning the barn, and we can see no reason for excluding any circumstance showing the extent of the fire and of the property burned. The whole transaction was properly open to the jury, and they were entitled to understand it all.

The testimony of Robert Billingsley, that, in a conversation four or five months after the fire, defendant, when asked whether he could keep the farm, said "he did not care; that he had got a good insurance on the house, and it might go to blazes, with the barn," was not, we think, proof of any admission that the barn had been burned by defendant, and that was the only point on which it can be claimed it had any relevancy.

We also think the defendant, Thomas W. Hamilton, could not properly be charged with the false statement of William Ham-

ilton. It was not a part of the *res gestæ*. It could not aid in defrauding the insurance company, in any way, and must be regarded as an independent assertion or act, within the excluding rule in *People v. Knapp*, 26 Mich., 112. It does not appear sufficiently under what circumstances a remark about insurance and the probability of more fires was said to have been made by the respondent, James Hamilton, and we cannot, therefore, determine it to have been erroneously admitted. The same rule will apply to the impeaching testimony on Van Valkenburgh's statements about William Hamilton.

We can find nothing which could render it admissible for the witness Hiram Allen to detail what was said by the witness Lettie Campbell concerning the facts which occurred the night of the fire. It is hearsay, pure and simple.

Henry Hamilton, being called by the prosecution, gave testimony concerning what took place at a certain party or dance at James Hamilton's the night of the fire. Being asked on cross-examination whether the dance was not talked of some time before it was got up, this was objected to. The defense stated that they proposed to show it was talked of, and invitations given a week or ten days before hand. The court ruled out the question, and the defense excepted.

To understand the bearing of the question, it will be necessary to refer to the account given by Fuller, of the proposed plan for burning the barn. That was, in substance, that, in order to prevent any suspicion, a dance should be got up at another person's house, and that during the course of the evening one of the Hamiltons was to go out for a supply of cider, and take advantage of that opportunity to light the candle, which would take some time to burn down to the straw, so that they should be away at the party at the time the fire should break out, and so escape suspicion. If the party had been arranged, and invitations given earlier than the alleged interview with Fuller, his whole story would be falsified. This was, then, a vital point in the case. It was, very clearly, legitimate cross-examination, upon the strictest rules. It referred to the very dance, concerning which the witness had been examined in chief, and was quite as relevant to the subject as any of the other circumstances on which he had been questioned. The objection that it would not contradict Fuller would not, if true, destroy its relevancy.



But whether it would do so or not would be a question of fact. Fuller swore that the conversation took place three or four days before the dance, and it might be longer. This last qualification could not operate so indefinitely as to cover a much longer period; and even if it did, the defense had a right to have the subject fully investigated. But Fuller swore positively that the dance was to be the next Monday evening, which would at any rate confine the preparations within a week. The court erred in shutting out this proof.

We think, also, that when Houseman had sworn to seeing the three Hamiltons apparently consulting together after the fire, the defense should not have been precluded from cross-questioning him as to the force of the impression made on him at the time, and as to the persons to whom he first mentioned it. It is only by thorough sifting that it can be known how much a witness has allowed his memory to be warped by subsequent suspicions.

Undoubtedly the real meaning of what is seen is not always understood at the time, and therefore it does not follow that a witness who had no suspicions until afterwards may not have observed and remembered accurately. But whether he has done so or not can never be unimportant. The conclusiveness of circumstantial evidence depends entirely on the assurance that facts have been truly seen and sworn to.

It was manifest error to refuse to allow Ribble to be impeached by testimony to contradict his denial, on cross-examination, of the part he had taken in getting up testimony. This was decided in *Geary v. People*, 22 Mich., 220. But we do not think the evidence of his statement in other cases, or generally, of his being open to bribery, comes within any recognized rule of impeachment, unless they have made him a reputation for untruthfulness; and then it is only the reputation which is admissible, and not its cause. It was not error to allow a witness to be asked if he had deserted, or another witness to be asked if he had been charged with crime. There was no attempt to impeach by contradiction on these collateral matters, and the answers were admissible.

It seems to us that the impeachment of Fuller, by Young and Jane Shutly, should have been received. He had been asked about his statements to them concerning his testimony in this case, and had denied making such statements. Yet Fuller's an-

swer as to Young was ruled out, and Jane Shutty was not allowed to answer. The place and time were fixed with reasonable certainty, no objection for uncertainty being made, when he was cross-examined, and his answers having been positive and sweeping, his statements that he had been offered a bribe, and would swear to it, were material.

The same remark will apply to the impeachment of Thomas Mulvaney by Nelson Howe, where time and place were fixed accurately, and the fact was recent. We do not see, however, on what principle testimony could have been received concerning the conversation of James Mulvaney, who had not been sworn, and was a stranger to the record in the circuit court.

We are also of opinion that the testimony in regard to playing cards in the barn with lights should have been allowed to be fully given. Fire might take from such a cause, and the defense were entitled to show all circumstances reasonably bearing on such a possibility.

Several questions of an impeaching nature were excluded on the ground that Fuller had made them to his counsel, and they were therefore privileged. We think the rule of privilege was misunderstood. We have no disposition to narrow or hamper privileged communications between clients and their attorneys or counsel. We concur fully in the broad and sensible doctrine laid down by Lord Selborne, in *Minet v. Morgan*, L. R., 8 Ch. Ap., 361, that neither client nor attorney can be compelled to answer and disclose matters of confidence. But the privilege is one created solely for the benefit of the client, and there is no ground for protection where he waives it. 1 Greenl. Ev., § 243; 1 Stark. Ev., 40; *Benjamin v. Coventry*, 19 Wend., 353. When a co-defendant in a criminal case turns state's evidence, and has attempted to convict others by proof also convicting himself, he has no right to claim any privilege concerning any of the facts bearing upon the issue. He has waived all privileges which would permit him to withhold anything. *Foster v. People*, 18 Mich., 266. It was expressly held in *Alderman v. People*, 4 Mich., 414, that this waiver covered confidential communications to attorneys, and there is no more reason for saving these than for saving the privilege against criminating disclosures conclusively waived. Both client and counsel may be compelled to disclose the client's statements which are pertinent to the issue.

A witness, William Gayton, having been sworn, to sustain Fuller's reputation for truth and veracity, was asked whether he had not said at a certain time and place that he would not believe Fuller under oath, and answered that he did not think he had done so at that time, but that it was likely he might have said so at the time of Fuller's arrest for this crime. This answer was stricken out as not responsive. He was then asked whether the arrest affected his opinion of Fuller one way or the other. This was ruled out, as well as a proposition to show his statement to different persons to the same effect, that he would not believe Fuller under oath.

The objection that the answer was not responsive was one which did not concern the prosecution, if it was relevant. The party examining a witness may sometimes object to volunteered and irresponsive statements made by a witness aside from his questions. But if he is willing to accept the answer, and if it was one he would have had a right to elicit, the opposite party cannot complain. There are cases, as in *Greenman v. O'Connor*, 25 Mich., 30, where the deposition of a witness is taken on settled written interrogatories, where an answer not called for may be objected to by either party for surprise, inasmuch as, if the question had been so put in writing as to call for it, other interrogatories might have been framed accordingly, which might have led to explanation. But no such difficulty can arise where the witness is examined openly and orally, and where a question calling for such an answer would have been competent. Was it proper then, to ask a sustaining witness, on cross-examination, whether he had said he would not believe the impeached witness under oath?

The purpose of any inquiry into the character of a witness is, to enable the jury to determine whether he is to be believed on oath. Evidence of his reputation would be irrelevant for any other purpose, and a reputation which would not affect a witness so far as to touch his credibility under oath, could have no proper influence. The English text books and authorities have always, and without exception, required the testimony to be given directly on this issue. The questions put to the impeaching and supporting witnesses relate, first, to their knowledge of the reputation for truth and veracity of the assailed witnesses; and, second, whether from that reputation they would believe

him under oath. The only controversy has been, whether or no the ground of belief must rest upon and be confined to a knowledge of reputation for veracity only. But confined to that, the authorities are harmonious. 1 Stark. Ev., 237, *et seq.*; 2 Phil. Ev. (Edw. ed.), 955, 958. A very recent decision is found in *Queen v. Brown & Hedley*, L. R., 1 C. C. R., 70.

The reason given is, that unless the impeaching witness is held to showing the extent to which an evil reputation has affected a person's credit, the jury cannot accurately tell what the witness means to express by stating that such reputation is good or bad, and can have no guide in weighing his testimony. And since it has become settled that they are not bound to disregard a witness entirely, even if he falsifies in some matters, it becomes still more important to know the extent to which the opinion in his neighborhood has touched him. It has also been commonly observed that impeaching questions as to character are often misunderstood, and witnesses, in spite of caution, base their answers on bad character generally, which may or may not be of such a nature as to impair confidence in testimony. When the question of credit under oath is distinctly presented, the answers will be more cautious.

Until Mr. Greenleaf allowed a statement to creep into his work on evidence, to the effect that the American authorities dis-favored the English rule, it was never very seriously questioned. See 1 Greenl. Ev., § 461. It is a little remarkable that of the cases referred to, to sustain this idea, not one contained more than a passing dictum not in any way called for. *Phillips v. King*, 1 Appleton (Me.), 375. The authorities referred to in that case contained no such decision, and the court, after reasoning out the matter somewhat carefully, declared the question was not presented by the record for decision. The American editors of Phillips and Starkie do not appear to have discovered any such conflict, and do not allude to it. They do however, as many decisions do, refer to the kind of reputation which should be shown, and whether of veracity or of other qualities. In *Webber v. Hanks*, 4 Mich., 198, no question came up on the record except as to the species of reputation, and the neighborhood and time of its existence; and what was said further was not in the case, and cannot properly dispose of the matter. The objection alleged to such an answer by a witness is, that it enables the

witness to substitute his opinion for that of the jury. But this is a fallacious objection. The jury, if they do not act from personal knowledge, cannot understand the matter at all without knowing the witness' opinion, and the ground on which it is based. It is the same sort of difficulty which arises in regard to insanity, to disposition or temper, to distances and velocities, and many other subjects, where a witness is only required to show his means of information, and then state his conclusions or belief based on those means. If six witnesses are merely allowed to state that a man's reputation is bad, and as many say it is good, without being questioned further, the jury cannot be said to know much about it. Nor would any cross-examination be worth much unless it aided them in finding out just how far each witness regarded it as tainted.

So far as the reports show, the American decisions, instead of shaking the English doctrine, are very decidedly in favor of it, and have so held upon repeated and careful consideration, and we have not been referred to, nor have we found any considerable conflict. See, in New York, *People v. Mather*, 4 Wend., 229 (which was the view of Judge OAKLEY, no opinion being given by his associate); *People v. Rector*, 19 Wend., 569; *People v. Davis*, 21 id., 309; in New Hampshire, *Titus v. Ash*, 4 Fost., 319; in Pennsylvania, *Boyle's Ex'rs v. Kreitzer*, 46 Pa. St., 465; *Lyman v. Philadelphia*, 56 id., 488; in Maryland, *Knight v. House*, 29 Md., 194; in California, *Stevens v. Irwin*, 12 Cal., 506; *People v. Tyler*, 35 id., 553; in Illinois, *Eason v. Chapman*, 21 Ill., 33; in Wisconsin, *Wilson v. State*, 3 Wis., 798; in Georgia, *Stokes v. State*, 18 Ga., 17; *Taylor v. Smith*, 16 id., 7; in Tennessee, *Ford v. Ford*, 7 Humph., 92; in Alabama, *McCutchen v. McCutchen*, 9 Port., 650; in Kentucky, *Mobley v. Hamit*, 1 A. K. Marsh., 590; also in Judge McLEAN's circuit, in *U. S. v. Van Sickle*, 2 McLean, 219.

Mr. Greenleaf himself intimates that it might be a proper inquiry on cross-examination. We think the inquiry proper when properly confined and guarded, and not left to depend on any basis but the reputation for truth and veracity. And we also think that the cross-examination on impeaching or sustaining testimony should be allowed to be full and searching.

Where an impeached witness has changed his domicile, there appears to be no objections to showing his reputation in both

places within a reasonable limit of time. But, as the only object is to know whether he is to be believed at the time when he testifies, a witness, knowing his reputation then, should state that knowledge, although he may also be authorized in addition to show what his reputation had been elsewhere before.

The court should not have permitted the jury to consider any counts except those that charged all the defendants or any except those which related to the burning with intent to defraud the insurers. No others specified any offense of which all could possibly have been guilty, and upon the rest there should have been a discontinuance or acquittal.

The testimony of Fuller, as an accomplice, was properly left to the jury to believe or not, whether standing alone or corroborated. It was for them to determine to what extent they could credit him, and all of the circumstances of his employment and conduct were proper to be considered as affecting his credit, and they should have been so instructed. But they could not be directed what force to give to these matters. That was their own province. While a jury cannot be compelled to disregard all the testimony of a witness who has wilfully falsified, yet they may do so if they do not trust it. In such a case they know the witness is not restrained by his oath, and they need not pay any respect to his statements beyond what they actually consider them to deserve. The fact that his evidence is more or less corroborated, does not in such a case lead to any necessary inference that all the facts he has sworn to are true. The jury will determine for themselves how far they can trust it, and should not have been directed that there was any condition on which they were forbidden to reject such testimony, if they did not believe it.

The circuit court was asked, but refused, to give the following instruction: "This is a criminal trial on an information for felony, and all the questions of law and fact in the case are exclusively for the jury, and the jury are paramount judges, both of law and facts." The court held they were judges of law and fact under some restrictions and conditions, but not in the absolute way indicated. The precise definition of the rights of a jury in criminal cases is easier understood than expressed. Their decision upon the guilt or innocence of a prisoner can never be directly reviewed, and upon an acquittal there can be no new trial. But if they have the legal authority claimed in the request, their ver-

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diet of guilty would be of the same force as their acquittal. In this country, for a long time past, exceptions have been usually allowed to the rulings of the court on the trial, and if those rulings are erroneous, the conviction will be set aside. But this can only be upon the idea that the jury are expected to follow the charges given; and it is as contrary to law, as usually administered, to refuse to give a proper charge, as to give an improper one. And if a judge were to decline to give any charge — as he might, if it is of no importance — it has been assumed that he would violate his duty.

The law does not favor unnecessary intrusions by one functionary upon grounds of others. But the charge of a judge in criminal cases is one of the ancient and traditional incidents of a trial, which must have been introduced for some purpose, and must have some value. It is certain that there is a great body of authority, holding it to be meant for the guidance and instruction of the jury, and entitled to their respect. It is true that juries in criminal cases cannot properly find a conviction against their conscience. It is also true that they cannot be questioned or held responsible upon their verdict, nor called on to explain its reasons. Whether those reasons are based on a doubt or disbelief of evidence, or on a rejection of the exposition of law given by the court, they are equally beyond review. At common law, a conviction was as final as an acquittal, and could only be relieved by a pardon. And it is very well understood that this immunity from censure or review is necessary to liberty. A jury cannot be compelled, in dealing with crimes, to separate the facts from the law. The right to give a general verdict is essential to the integrity of the system, and all attempts to deprive juries in criminal cases of that power have been opposed as destructive of the system; and experience has shown that special verdicts in such cases have not been favorable to justice. We need not hesitate to determine that it is within the power of juries to act upon their own view of the law. But it does not follow from this that the law does not assume that they will respect the instructions of the court.

The power of juries in criminal and civil cases is the same in kind, though different in degrees. The practice of disregarding or relieving against wrong verdicts in civil cases is one largely of modern growth. In early times, verdicts were substantially



conclusive. In modern times, though they may be set aside, they cannot be reviewed or altered; and setting aside verdicts, as against law, is a matter of discretion, and not of right. An appellate court can only review the action of the judge, not that of the jury; and this, too, is not by virtue of the old law, but by force of statutes, which, though ancient, are yet later in origin than jury trials. The jury system is generally regarded as deriving one of its chief advantages from having the law applied to the facts by persons having no prominent offices as magistrates, and who are not likely to get into the habit of disregarding any circumstance of fact, or of forcing cases into rigid forms and arbitrary classes. It is especially important, where guilt depends on a wrong intent, to give full weight to every circumstance that can possibly affect it; and professional persons are under a constant temptation to make the law symmetrical by disregarding small things. But it is necessary for public and private safety, that the law shall be known and certain, and shall not depend on each jury that tries a cause; and the interpretation of the law can have no permanency or uniformity, and cannot become generally known, except through the action of courts.

It may be fairly regarded as one of the best features of the jury system, that the law, though interpreted by professional interpreters, can only be applied to facts through the understanding of ordinary men of average capacity, and usually including in their number some of very simple minds. By this process it is divested of all that would not be readily comprehended by all men. In this way, over-nicety and technicality become less dangerous, if not absolutely harmless; and an apparent deviation in the verdict from the rules laid down is often no departure from the rules as supposed to be laid down.

But if the court is to have no voice in laying down these rules, it is obvious that there can be no security whatever, either that the innocent may not be condemned, or that society will have any defense against the guilty. A jury may disregard a statute just as freely as any other rule. A fair trial in time of excitement would be almost impossible. All the mischief of *ex post facto* laws would be done by tribunals and authorities wholly irresponsible, and there would be no method of enforcing with effect many of our most important constitutional and legal safeguards against injustice. Parties charged with crime need the

protection of the law against unjust convictions, quite as often as the public needs it against groundless acquittals. Neither can be safe without having the rules of law defined and preserved, and beyond the mere direction of anyone. We must construe the jury system, like all other parts of our legal fabric, in the light of history and usage. It came into this country as a part of our common law, and it has been fixed by our constitutions as a known and regular common law institution. Like many of our best heritages from that source, we know what it is, better than how it was devised, or, which is more probable, came into use without devising. We must look to the use as evidence of the law; and, looking to that, we find that the judge has always assumed to give the jury instructions upon the law. We find, further, that while there have been severe complaints and stern measures to secure them from his control on the facts, there has never been any attempt to abolish the practice of charging on the law. All the improvements in mitigation of the old system have gone upon the ground that the jury were expected to follow the instructions of the court. The introduction of reserved cases and criminal exceptions would be little short of an absurdity on any other theory. If there were any grounds of complaint, it would not be for wrong instructions, but for giving any charge at all. There is much difficulty in dealing with arguments which assume to qualify a system, and yet are not consistent with its uniform history. A jury system without a presiding judge who is something more than a puppet is not the jury system which we have inherited.

It would not be profitable to collate or discuss the authorities at length. They differ in terms more than in substantial results. If the charge is proper, it can only be so because it is to be respected. If juries disregard it, they may be free from personal risk, and, in case of acquittal, their verdict is conclusive. But their power to do wrong with impunity does not make wrong right. The same thing cannot be lawful and unlawful when done by different persons.

We understand the uniform practice, and the decided weight of opinion, to require that the judge give his views of the law to the jury as authority, and not as a matter to be submitted to their review. And while we recognize the power of the jury to give wrong verdicts, or to disregard the law, we are nevertheless war-

ranted by usage and authority in holding that such conduct would be an abuse of their discretion, which could only be palliated by such tyrannical and perverse instructions as their good sense should teach them could not possibly be true or just.

This question was presented many years ago to the then supreme court, but for some reason the decision, if made, has not been reported, and is not found. *People v. Supple*, January, 1853.

There is undoubtedly some difference between civil and criminal cases in regard to legal presumptions, which will prevent a judge from instructing a jury in the same way as to their weight. This was somewhat discussed in the case of *Maher v. People*, 10 Mich., 212. It is very well remarked by a modern writer on evidence, that "artificial presumptions can never be safely established as means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals, who might otherwise have escaped. 2 Hale, 289. From such presumptions the common law is justly most abhorrent, and happily our statute-book has not been disgraced by many violations of the humane principles of the common law in this respect." Stark. Ev., 143, note f, ed. of 1869. There is no conclusion or presumption of fact which is not entirely within the disposal of the jury, as it is also entirely for them to determine what portion of testimony to believe or disbelieve, and "it is the conscience of the jury that must pronounce the prisoner guilty or not guilty." 2 Hale, 313. But while the rules of criminal law narrow the functions of the judge, they do not abrogate those functions.

Some errors are alleged concerning the dealings of the court with questions of fact. The jury were very fully directed that they must decide upon the facts for themselves, and we do not discover any instructions to the contrary, of such a nature as to call for further comment. The particular errors of this kind mentioned in the argument do not appear material, or in any way calculated to mislead, and need not be referred to, unless upon the question of intent. It is possible the language used in that regard may have gone too far, but we do not deem it necessary to discuss it, as the judgment is reversed on other grounds, and it is not likely that such a question will arise again on a new trial.

Neither are we disposed to discuss the question concerning the precise limits of a reasonable doubt. The jury were told they could not convict without being satisfied to a moral certainty, and that defendant was entitled to the presumption of innocence till every branch of the case should be established against him by evidence. They were also told that if they found a single material fact inconsistent with his guilt, they could not convict. It is very possible that the definition by the court of a reasonable doubt, as being such a one as would prevent the jurors from acting in their most important concerns, would, if standing alone, have been of questionable sufficiency. Yet whether correct or not, it could certainly have done no harm with the aid of the other instructions given.

But we do not think that juries can derive any help from attempts, by numerous and complicated requests, to explain what would be very much plainer without them. If a jury cannot understand their duty when told, they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as may require a trained mind to distinguish. Jurors are presumed to have common sense, and to understand common English. But they are not presumed to have professional, or any high degree of technical or linguistic training. The majority of special requests in this case, on both sides, might have been omitted with advantage; and if the jury came to a wrong conclusion — on which we have no right to speculate — we do not conceive that any course that might have been taken, in regard to most of the questions propounded, would have relieved them from their difficulties.

For the reasons we have given, the judgment must be reversed and a new trial granted, and the respondent must be remanded into the custody of the proper sheriff, to be held in custody until bailed or otherwise dealt with according to law.

COOLEY, J., and GRAVES, C. J., concurred. CHRISTIANCY, J., did not sit in this case.

NOTE. — In *Lindsay v. People*, 63 N. Y., 143, it was said that, "Although it is not usual to suffer a conviction upon the wholly uncorroborated testimony of an accomplice, and juries are advised not to convict without a confirmation as to the material facts; still if the jury are fully convinced of the truth of the statement of a witness thus situated, they may convict upon his testimony alone." The court

further say "It being merely a rule of practice and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony."

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BARCLAY *vs.* STATE.

(55 Ga., 179.)

PRACTICE: *Disposing of mortgaged property.*

Under an indictment for fraudulently disposing of mortgaged property it is not admissible to allege in the indictment and prove on the trial a mistake in the description of the mortgaged property in the mortgage.

JACKSON, J. The defendant was indicted under section 4600 of the Code, for having sold and disposed of a certain bay *horse* mule, after having mortgaged the said mule to the mortgagee, with the intent to defraud the mortgagee. It was alleged in the indictment, that by mistake the mortgage described the animal as a bay *mare* mule. Evidence was admitted to show the mistake, and the defendant was convicted. We think the court erred in admitting the evidence, and that the conviction is illegal. In a civil case, this evidence may be admissible, but in a criminal case, we hold it is not, where the instrument in writing is the basis of the prosecution.

The judgment is, therefore, reversed.

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STATE *vs.* NEELY.

(74 N. C., 425.)

ASSAULT AND BATTERY WITH INTENT TO COMMIT RAPE: *Assault—Evidence.*

On an indictment for assault and battery with intent to commit rape, the evidence was substantially as follows: The prosecutrix, a white woman, having parted from a companion, started to go home alone through the woods. She heard the respondent, a negro, call out to her to "stop," and saw him running after her about seventy yards away. She began to run as hard as she could, and was pursued by the respondent, who called to her to stop three times, and was catching up with her. He pursued about a quarter of

a mile through the woods, when coming to the edge of the woods he saw a dwelling house near by, and turned back and ran off. It was held:

That there was sufficient evidence of an assault.

That there was sufficient evidence of the intent to commit rape.

RODMAN and BYNUM, JJ., dissenting.

INDICTMENT, for an assault with intent to commit a rape, tried before SCHENCK, J., and a jury, at fall term, 1875, of the superior court of Cabarrus county.

It was in evidence that on the 10th of July, 1875, the prosecutrix, a woman over ten years of age, and a young girl were returning home, along the track of the North Carolina Railroad, a few miles from Concord. When they reached a point on the railroad at which a country road crossed the same, the prosecutrix and the girl separated. The road taken by the prosecutrix led through a woods about a quarter of a mile, to the house of her brother-in-law with whom she then resided. Very soon after she left the railroad, she heard the prisoner, a colored man, "holler" to her to "stop," and saw him running after her, distant about seventy yards. The prosecutrix then began to run "as hard as she could," and was pursued rapidly by the prisoner, who "hollered" three times to her to "stop." The prisoner was approaching her, until the road emerged from the woods into a lane. When the prisoner reached the "mouth of the lane," and saw the dwelling house of the brother-in-law of the prosecutrix near by, he fled in the direction of the railroad and into the woods. He was pursued and was taken shortly afterwards at a section house. The prosecutrix was put in great fear by the assault.

The record sent to this court upon appeal says: "There was other evidence bearing on the intent with which he pursued the prosecutrix, which it is not necessary to set forth in detail."

The court charged the jury: "That this was a very serious charge against the prisoner, and it was the duty of the state to prove all the essential facts constituting it, beyond a reasonable doubt, and that if they had reasonable doubt, they must acquit."

As to the assault, the court charged: "That if the prisoner pursued the prosecutrix against her will, with the intent violently to take hold of her person, and caused her to flee, and then continued to pursue her, this would be an assault, and that if they found that the prisoner committed such an assault with the

intent carnally to know the person of the prosecutrix, violently and against her will, he would be guilty, and they must so find; otherwise they would acquit."

To this charge the prisoner excepted.

The jury rendered a verdict of guilty, whereupon the prisoner moved the court for a new trial. Motion overruled. Sentence pronounced and the prisoner appealed.

*Shipp & Bailey*, for the prisoner.

*Hargrove*, Attorney General, for the state.

PEARSON, C. J. That the prisoner, upon the facts set out in the statement of the case, committed an assault, is not an open question. *State v. Davis*, 1 Ired., 125; *State v. Rawles*, 65 N. C., 334; *State v. Vannoy*, id., 532.

This it would seem was the only point relied on by the counsel of the prisoner in the court below. We are led to the inference that the points as to there being no evidence of the intent to commit a rape were not taken in the court below, by the fact that in stating the case his honor assumes that the intent charged was fully proved and given upon the trial, and contents himself with setting out "there was other testimony bearing on the intent with which he pursued the prosecutrix, which it is not necessary to set forth in detail." Clearly had the point been made, that there was *no evidence* fit to be left to the jury as to the intent charged in the indictment, his honor would have seen that it was necessary to set forth in detail the other testimony, "bearing on the intent with which he pursued the prosecutrix." However this may be, giving the prisoner the benefit of the rule, "what does not appear does not exist," and relieving him from the rule, "the appellant must show error and intendments are to be taken against him," we will consider the case as presenting the question: Do the facts and circumstances set out amount to any evidence fit to be left to the jury as to the intent charged? Or was the matter of intent left so much in the dark as to make it the duty of the judge to have instructed the jury to have acquitted the prisoner of the criminal intent charged?

A majority of the court are of the opinion that there was evidence to be left to the jury as to the intent charged. For my own part I think the evidence plenary, and had I been on the jury, would not have hesitated one moment.



I see a chicken cock drop his wings and take after a hen; my experience and observation assure me that his purpose is sexual intercourse; no other evidence is needed.

Whether the cock supposes that the hen is running by female instinct to increase the estimate of her favor and excite passion, or whether the cock intends to carry his purpose by force and against her will, is a question about which there may be some doubt; as for instance if she is a setting hen and "makes fight," not merely amorous resistance.

There may be evidence from experience and observation of the nature of the animals, and of male and female instincts, fit to be left to the jury upon all of the circumstances and surroundings of the case, Was the pursuit made with the expectation that he would be gratified voluntarily, or was it made with the intent to have his will against her will and by force? Upon this case of the cock and the hen, can any one seriously insist that a jury has no right to call to their assistance their own experience and observation of the nature of animals and of male and female *instincts*.

Again: I see a dog in hot pursuit of a rabbit; my experience and observation assure me that the intent of the dog is to kill the rabbit; no doubt about it, and yet according to the argument of the prisoner's counsel, there is no evidence of the intent.

In our case, when the woman leaves the railroad and starts for her home, and is unaccompanied, to pass through woodland for one-fourth of a mile, a negro man calls her to stop; he is at the distance of seventy-five yards; she with female instinct, from the tone of his voice, looks and sees his purpose, and runs as fast as she can through the woodland and makes the head of the lane in sight of the house before he is able to catch her; he pursues to the end of the lane, and then flees and attempts to escape in the woods.

It is said in the ingenious argument of the counsel of the prisoner, his intent may have been to kill the woman, or to rob her of her shawl or of her money, and if the jury cannot decide for which of these intents he pursued her, they ought to find a verdict for the defendant. The fallacy of this argument is, I conceive, in this: it excludes all the knowledge which we acquire from experience and observation as to the nature of man. This is the corner stone on which the institution of trial by jury

rests. To say that a jury are not at liberty to refer to their experience and observation, when a negro man, under the circumstances of this case, pursues a white woman, starting at, say seventy-five yards and gaining on her, and being near when she gets in sight of the house, when he stops and flees into the woods, is, as it seems to me, to take from a trial by jury all of its recommendations.

Our case particularly called for the observation and experience of the jurors as practical men. The prisoner had some intent when he pursued the woman. There is no evidence tending to show that his intent was to kill her or to rob her, so that the intent must have been to have sexual intercourse, and the jury considering that he was a negro, and considering the hasty flight of the woman, and the prisoner stopping and running into the woods when he got in sight of the house, and the instinct of nature as between male and female, and the repugnance of a white woman to the embraces of a negro, had some evidence to find that the intent was to commit a rape.

RODMAN, J. (*dissenting*). I cannot concur in the opinion of the majority of the court, and will state the reasons for my dissent with as much brevity as is consistent with clearness.

Upon the authority of *State v. Rawles*, I admit there was evidence on which the jury might convict a prisoner of a simple assault.

But in my opinion the record sets forth no evidence fit to go to the jury, or upon which they could reasonably find the prisoner guilty with the intent charged. The intent was an essential ingredient of the offense charged, and there was no evidence of it.

In the opinion of the court, as delivered by the chief justice, the argument is, that because from certain actions of certain brute animals, a certain intent would be inferred, a like intent must be inferred against the prisoner from like acts.

It seems to me that the illustrations are not in point, even if that method of reasoning be allowable at all. The chicken cock in the case supposed has no intent of violence. He expects acquiescence, and knows he could not succeed without it, and besides, he is dealing with his lawful wife.

But the method of reasoning is misleading and objectionable

on principle. It assumes that the prisoner is a brute, or so like a brute that it is safe to reason from the one to the other; that he is governed by brutish, and in his case, vicious passions, unrestrained by reason or a moral sense. This assumption is unreasonable and unjust. The prisoner is a man, and until conviction at least, he must be presumed to have the passions of a man, and also the reason and moral sense of a man, to act as a restraint in their unlawful gratification. Otherwise he would be *non compos mentis*, and not amenable to law. He is entitled to be tried as a man, and to have his acts and intents enquired into and decided upon, by the principles which govern human conduct, and not brutish conduct. Assume as the opinion of the court does, that the inquiry as to his intent is to be conducted upon an analogy from the intents of brutes, you treat him worse than a brute, because what would not be vicious or criminal in a brute is vicious and criminal in him, being a man. When you assume him to be a brute, you assume him to be one of vicious propensities. If that be true, what need of court and jury? The prisoner is not only *feræ nature* but *caput lupinum* whom any one may destroy without legal ceremony.

The evidence of the prisoner's intent is circumstantial; the circumstances being the pursuit and its abandonment when he got in sight of White's house. It is the admitted rule in such cases that if there be any reasonable hypothesis upon which the circumstances are consistent with the prisoner's innocence, the judge should direct an acquittal, for in such cases there is no positive proof of guilt. The particular criminal intent charged must be proven. It will not do to prove that the prisoner had that intent or some other, although the other may have been criminal; and especially if the other, although immoral, was not criminal. In *Ree v. Loyd*, 7 C. & P., 318 (32 E. C. L. R. 523), it was held by PATTERSON, J., that in order to convict of assault with intent to commit a rape, the jury must be satisfied, not only that the prisoner intended to gratify his passions on the prosecutrix, but that he intended to do so at all events and notwithstanding any resistance on her part. *Roseoe Cr. Ev.*, §11. It is not proof of guilt, merely, that the facts are consistent with guilt; they must be inconsistent with innocence. It is neither charity, nor common sense, nor law, to infer the worst intent which the

facts will admit of. The reverse is the rule of justice and law. If the facts will reasonably admit the inference of an intent, which though immoral is not criminal, we are bound to infer that intent.

In the present case, may not the intent of the prisoner have been merely to solicit the woman, and to desist, if she resisted, his solicitations? Or may it not be that he had not anticipated resistance, and would desist in case it occurred? Either hypothesis will do, and either is consistent with every fact in evidence; with the pursuit, and with its abandonment, when the prisoner apprehended discovery. There is absolutely no evidence that the prisoner had formed the intent charged, viz.: to know the woman in spite of resistance and at all hazards.

We are told in the Sacred Book that "whoso looketh on a woman to lust after her hath committed adultery in his heart;" *adultery*, not *rape*. In the minds of men there is a wide space between the immoral intent to seduce a woman, and the criminal intent to ravish her. It is at this point that the inference drawn from the assumed identity of civilized men, with brutes, is most misleading and unfair. A man may perhaps be easily led by his passions to form the immoral intent to solicit a woman, and to attempt to execute it. But, as a reasoning being, he will pause before he forms the intent, and attempts to execute it, to commit so hideous and penal a crime as rape; one so certain of detection and punishment. The moral sense which every man has, in a greater or less degree, and the terrors of the law, come in to hold him back from the determination to commit the crime, and to make him take a period for deliberation, which, in the absence of evidence to the contrary, it must be presumed, he availed himself of. Whereas, in the brute, there are no such restraints, as the gratification of his passions is neither a sin nor crime. Surely the same rules of evidence cannot apply to beings so different and acting under different moral and legal responsibilities.

The difference in color between the prosecutrix and the prisoner, although it would aggravate the guilt upon the prisoner upon conviction, cannot justly affect the rules of evidence, by which his guilt is inquired into. These must be the same for all classes and conditions of men.

It seems to me that the decision of the court is a departure

from what I had supposed to be a firmly established rule of evidence for the protection of innocence.

BYMUM, J., concurs in the dissenting opinion of Justice RODMAN.

PER CURIAM:

*There is no error.*

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GREER vs. STATE.

(50 Ind., 267.)

ASSAULT WITH INTENT TO RAVISH: *Pleading — Rape — Statute construed — Evidence.*

On an indictment for an assault with intent to ravish, which did not state that the act was done "unlawfully" or "feloniously," it was *held*, that the indictment was bad as to the intent to ravish, but good as an indictment for an assault and battery, and that a motion to quash was, therefore, properly overruled.

By statute, rape is divided into rape on females over the age of twelve years, and under the age of twelve, and evidence of a rape of the one class will not sustain a conviction for a rape of the other class.

Where the indictment does not state the age of the female, the court will intend that she was over twelve years of age, and evidence of a rape on a female under the age of twelve years will not sustain the indictment.

The same rule applies to indictments for assault with intent to commit rape.

Where an indictment for an assault with intent to commit rape does not state the age of the prosecutrix, evidence of an assault with intent to commit rape on her, she being a female under the age of twelve years, will not sustain a conviction.

WORDEN, J. An indictment was found against the appellant, charging that he, "on the 19th day of January, A. D. 1875, at the county of Marion, and state of Indiana, did then and there, in a rude, insolent and angry manner, unlawfully touch and assault one Mary E. Clayes, a woman, with the intent then and there the said Mary E. Clayes, forcibly and against the will of the said Mary E. Clayes, to ravish and carnally know, contrary," etc.

Motion to quash overruled, and exception. Trial by jury, conviction, and judgment, that defendant pay a fine of one hundred dollars, and be imprisoned for the term of two years in the state prison.

The overruling of the motion to quash is assigned for error. It will be seen that, in describing the crime which the defendant

is charged with having intended to commit, viz., the rape, the pleader has not used the word "unlawfully," which enters into the statutory description of that offense. No equivalent word is used. Had the word "feloniously" been used in describing the intended rape, that would, doubtless, have been sufficient, as an act could not be felonious without being unlawful. *Weinzorpflin v. The State*, 7 Blackf., 186; *Sloan v. The State*, 42 Ind., 570. It would seem, therefore, that the indictment is not good for anything more than a simple assault and battery. But the motion to quash was correctly overruled, because the indictment contained a valid charge of assault and battery, and the intent charged, though nugatory, does not vitiate that which is correctly charged. The motion to quash appears to have been addressed to the whole indictment, and not to that part merely charging the intent.

There was no motion in arrest of judgment, nor is it assigned for error that the indictment is not sufficient to sustain the judgment. There was no exception taken to the judgment as rendered. The objection to the indictment is in no way so presented to this court as to make it available to the appellant.

We proceed to the consideration of other questions arising in the cause.

It appeared on the trial of the cause, that the person charged to have been assaulted by the defendant was a female child, between eleven and twelve years of age at the time of the assault. The court gave, as applicable to the case, the following charge, to which the defendant excepted, viz.:

"You will observe that if a person has carnal knowledge of a woman child, under the age of twelve years, he is guilty of rape, whether the carnal knowledge was with or without the consent of the child; for the law presumes that a child under the age of twelve years is not capable of consenting to intercourse, so that a man having connection with her is guilty of rape, whether it was with her consent or not."

The jury must have understood from this charge that if the defendant perpetrated the assault and battery upon the child, she being under the age of twelve years, with intent to have carnal connection with her, he might be convicted of the offense charged, without regard to the question whether he intended to have such connection with or without her consent.

The charge may have been correct as an abstract proposition, but it was clearly wrong as applied to the charge contained in the indictment. The indictment charges that Mary E. Clayes, the person charged to have been assaulted, was a woman, and that the defendant intended carnally to know her forcibly and against her will. The statute defining and providing punishment for rape, provides that "every person who shall unlawfully have carnal knowledge of a woman against her will, or of a woman child under twelve years of age, shall be deemed guilty of rape," etc. 2 G. & H., 440, sec. 14. This statute, it will be seen, enumerates two classes of facts, each of which constitutes a rape. First, it is a rape to unlawfully have carnal knowledge of a woman against her will. We take it that all females of the human species over twelve years of age are to be deemed women within the meaning of the first clause of the statute. Second, it is a rape to unlawfully have carnal knowledge of a woman child under twelve years of age. In the second case, it is immaterial whether the child consent or not, for if she consent, the act constitutes a rape nevertheless. But the prosecutor cannot charge a rape of the one class and sustain the charge by proof of a rape of the other class. Nor can he charge an assault and battery with intent to commit a rape of the one class, and sustain the charge by evidence of an intent to commit a rape of the other class. The variance between the allegations and the proof is fatal.

This is established by the following, among other authorities that might be cited: 1 Whart. Crim. Law, sec. 611; 1 Bish. Crim. Proc., secs. 485, 486; *Turley v. The State*, 3 Humph., 323; *Hooker v. The State*, 4 Ohio, 348; *The State v. Noble*, 15 Me., 476; *State v. Jackson*, 30 id., 29; *Dick v. State*, 30 Miss., 631.

There need be no trouble in cases of this kind, as, if there is any doubt about the age of the person assaulted or ravished, the offense can be charged both ways in different counts. A motion for a new trial was properly made, and should have been sustained.

There are some other questions made in the cause, but as we suppose they will not be likely to again arise upon the trial of the defendant upon this indictment, we pass them over.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.



## STATE vs. NILES.

(47 Vt., 82.)

## RAPE: Evidence — Complaint by prosecutrix.

On the trial of a man for rape on his step-daughter, a girl of twelve years of age, and small for her age, it was *held*, that a charge that "if the girl in the first instance consented to the sexual intercourse with the respondent, but if after the commencement of the sexual intercourse, she withdrew her consent and the respondent forcibly continued it with knowledge of her dissent, this would be rape," was proper, and not error under the circumstances of the case.

A complaint by the prosecutrix, made two months after the commission of a rape, is admissible against the respondent on a trial for rape.

On a trial for rape the prosecution may give in evidence the fact that the prosecutrix made a complaint charging that the offense was committed, but it is error to admit the particulars of the charge, or the name of the person charged by her.

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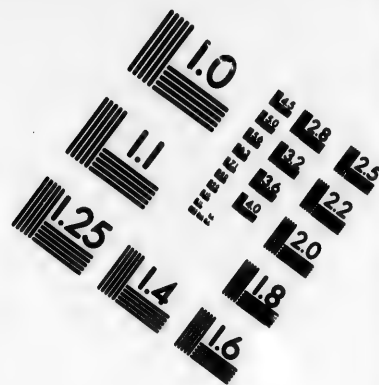
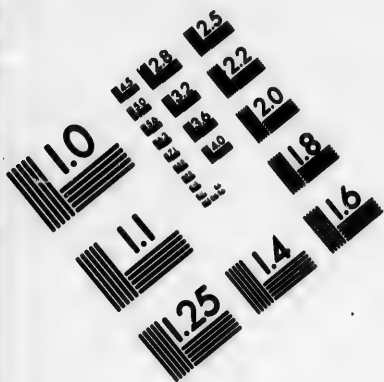
INDICTMENT for rape on Lillian Gray, a female above the age of consent, on the 20th day of January, 1874. Plea, not guilty. Trial by jury and verdict of guilty. June term, 1874. Ross, J., presiding.

The evidence on the part of the state tended to show, that the said Lillian, on or about the day in question, left the residence of the respondent in Burke, in company with him, and went with him a distance of about two miles to Watson's sugar house, and that soon after leaving the respondent's house, he informed her of his intention to go to said sugar house, and there have sexual intercourse with her; that no violence or threats were there employed, but the said Lillian followed the respondent to said place without resistance or complaint; that there she made no outcry and no resistance, other than is hereinafter stated. The only testimony in regard to what took place in the sugar house was that of the said Lillian, who testified: "We went into the sugar house; stayed there about fifteen minutes; no path to sugar house; he went forward; went into sugar house; he took off my underclothes, and put me on boards or a slab; he got on top of me; I was wet; I tried to get away from him; he held me there; stayed about fifteen minutes; went then to West Burke, at German's; he bought me a dress; then went home." On the cross-examination, she testified: "He held me by getting on top of me. Knew soon after he started

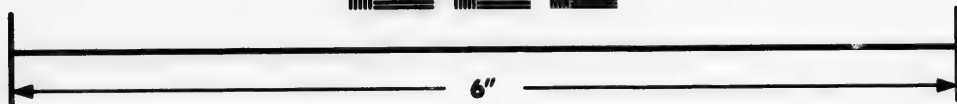
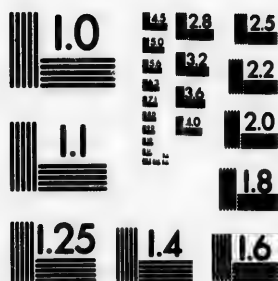
from home, that we were going to the sugar house for this purpose. Didn't holloa or scream. I wanted to get up, but he wouldn't let me. I believe that was all I tried to get away from him." She testified that the respondent, after the act complained of, made threats to her in case she disclosed it; but no violence or threats were made other than as above set forth. Lillian was the daughter of the respondent's wife, and then only twelve years old, and of small stature. About the first of the following April, the respondent's wife left him to go and live with Mrs. Ladd, at Barton Landing, taking Lillian with her. Up to this time, Lillian had never made any complaint of the respondent's usage of her, and never disclosed it to any one. Mrs. Ladd was then and still is unfriendly to the respondent. She testified that two weeks after Lillian arrived at her house, in response to her inquiries, Lillian complained of the respondent's usage of her, above testified to, which had occurred some two months previously, and said she had not told of it before because she did not dare to, "for he said he would kill me and mother too, if I told."

The respondent excepted to the admission of this testimony. It had appeared uncontradicted that until Lillian went to Mrs. Ladd's to live, she had lived with her mother in a house with the respondent. The state, in corroboration of Lillian's story, gave medical testimony tending to show that some person had had sexual intercourse with her, and probably several times. The court, among other things not excepted to, charged the jury that if Lillian, in the first instance, consented to the sexual intercourse with the respondent at the time and place alleged, and if the respondent commenced and entered upon the sexual intercourse with her consent, but she then withdrew her consent, and the respondent forcibly continued the intercourse after he had knowledge of her dissent, it would be rape. The charge was in all other respects satisfactory to the respondent, and such as the case called for. To so much of the charge as is given, the respondent excepted.

ROYCE, J. The respondent was indicted and tried for committing a rape upon one Lillian Gray. The said Lillian Gray was produced as a witness by the state, and in her testimony, gave a particular history of the transaction, and charged the respondent directly with the commission of the crime, and gave the time,



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place and circumstances of its commission. The state called Mrs. Ladd as a witness, and she was permitted to testify against the respondent's objection that Lillian, in response to her inquiries, about two months after the alleged commission of the crime, complained to her of the respondent's usage of her as above testified to; by which we understand that Mrs. Ladd testified that Lillian told her the same story that she had testified to in court. Two objections have been urged against the admissibility of Mrs. Ladd's evidence; the first is, that the complaint was not made to her within such a period of time as to make it admissible. Evidence of this character is only admissible as confirmatory of the evidence given by the party upon whom the rape is alleged to have been committed. It was ruled by HOLROYD, J., in *Clarke's Case*, 2 Stark., 241, that in a prosecution for rape, the fact of a woman's having made a complaint soon after the assault took place is evidence. This rule has been embodied into all the text books upon evidence; but it has never been understood that mere lapse of time could be made the test upon which the admissibility of such evidence depended. The time that intervenes between the commission of the crime and the making of the complaint is a subject for the jury to consider in passing upon the question of the weight that should be given to the evidence; so that this objection was not well taken. The second objection was to permitting Mrs. Ladd to testify to the particulars of the complaint. It was held in *Clarke's Case*, above cited, that the particulars of the complaint could not be given in evidence. The rule is, that it is competent to prove that the person upon whom the rape is alleged to have been committed made a complaint, and that an individual, without naming him, was charged with its commission. In *Regina v. Osborne*, 1 C. & M., 622 (41 E. C. L., 338), after the witness had testified that the prosecutrix made complaint, and charged a particular person with the commission of the rape, it was proposed to ask her whose name was mentioned by the prosecutrix, and the court held that it was not permissible. See also *Regina v. Megson et al.*, 9 C. & P., 418, and *Reg. v. Guttridges et al.*, id., 471.

This objection we think was well taken. The exception taken to the charge of the court has to be considered with reference to the facts disclosed by the evidence, and, as applicable to this case, we think it was unexceptionable. There is no rule upon

the subject, of universal application; and in the adoption of a rule for this case, the court might well take into consideration the age and physical strength of the girl upon whom the rape was alleged to have been committed, and the relation she sustained to the respondent, and all the other circumstances disclosed by the evidence.

Judgment reversed, and cause remanded.

NOTE. — In *Stephens v. State*, 11 Ga., 225, the court use this language: "The law, to be sure, has said, by implication at least, that when consent is given, after ten years of age, a rape cannot exist. But this, after all, is a mere presumption, and may be rebutted. Has it been overcome by sufficient evidence in the present case?"

"The parents testify that their daughter is sickly and weakly, and poorly grown. Her mother swears that she is nothing but a child; that she has never had her monthly courses; and that there was no appearance of womanhood about her. Is this weak minded creature, as she is shown to be, and on which account partly she was not brought as a witness on the stand, capable of consent to such a deed; could she have sought her own gratification? \* \* \* Believing, as I do from the evidence, that the passions of this girl had not arrived at that maturity to authorize a supposition of sexual intercourse, *with her consent*, and seeing that her person has been most shamefully outraged, I would, were I in the jury box, seize upon the slightest proof of resistance — notwithstanding she may have been enticed to give her consent in the first instance — even the usual struggles of a modest maiden, young and inexperienced in such mysteries, to find, in just such a case, that the act was against her will, and that the presumption of law was so strong as to amount to proof of force."

So in *Wright v. State*, 4 Humph. (Tenn.), 194, where the prosecutrix was a child just over the age of consent, a charge that "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterwards forced against her will," was held to be correct.

Where the prosecutrix was fifteen years of age, and the defendant a man of thirty-five, the court said: "The age of the prosecutrix is always important to be considered in such cases. It is held that if under twelve years of age (by our statute, ten, § 4204) she is incapable of consent. If she is very young, though over this age, and of mind not enlightened on the question, this consideration will lead the jury to demand a less clear opposition, than if she were older and more intelligent." *State v. Cross*, 12 Iowa, 66.

So in *People v. Lynch*, 29 Mich., 274, where the prosecutrix was an undeveloped girl, not quite fourteen years of age, the following charge was held correct: "Now, it has been said that no conviction should be had for rape where the circumstance of the resistance was equivocal, and this applies with a very large degree of force to the case of an adult female, one who is supposed to be old enough to comprehend the nature of such an act, and the purpose of it. \* \* \* What was the age of this child? Had she arrived at such an age that she was capable of comprehending the nature of the act? Did she comprehend it when she discovered him, if that was the fact, upon her body, his naked person in contact

with hers, and found that she was being hurt? Did she comprehend the nature of the act, if she had not arrived at the age of puberty? Was she of that tender age when she might not have any more knowledge or idea of it than some other child under ten years of age. \* \* \* She might not be able, from any volition of her own, to consent or dissent any, more than a child under ten years of age, because she might know nothing about whether the act was injurious, or would be injurious, or of its possible or probable consequences."

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SHIRWIN vs. PEOPLE.

(69 Ill., 55.)

**RAPE:** *Evidence — Practice — Improper remarks of court in presence of jury — Continuance.*

Respondent being arraigned on the 14th, his trial was set for the 18th. On the 14th he had his subpoenas issued, but a material witness in his behalf could not be served, being temporarily absent. On these facts being shown to the court by affidavit, it was *held* that a motion for a continuance should have been granted, and to refuse it was error.

On a trial for rape, where the prosecutrix testified that at the time of the act she was unconscious, and did not know whether defendant had ravished her, and a physician, who examined her had been allowed to testify that some body had had sexual intercourse with her, it was *held* that the respondent had a right to prove previous particular acts of sexual intercourse between the prosecutrix and others.

An improper remark, prejudicial to the respondent, made by the court in ruling out testimony, is error.

McALLISTER, J. An indictment, charging plaintiff in error with the crime of rape upon one Bertha Kaminski, was presented in the criminal court of Cook county, July 12, 1873, whereupon a *capias* issued, upon which the accused was arrested and committed to trial.

On Monday, the 14th of the same month, the accused was arraigned, and the plea of not guilty entered. The court then ordered the case to be set for trial on the next succeeding Friday, being the 18th of the same month.

On the day of the arraignment, accused proceeded to prepare for his trial, by causing a subpoena to be issued for his witnesses, among whom was one Mary Kehoe. This subpoena was then placed in the hands of an agent employed to serve it, who used all the diligence practicable, within the time allowed, but was



unable to serve it upon said Mary Kehoe, by reason of her absence beyond the reach of the subpoena. When the case was called for trial, on the day fixed by the court, the accused prepared and presented to the court his affidavit, upon which he asked that the trial of the cause might be put off until the August term, a period of only about three weeks, in order to enable him to procure the testimony of said Mary Kehoe, who was shown to be only temporarily absent from the city of Chicago, and was expected to return in time for the next term of court.

The facts set forth, which the accused expected to prove by the absent witness were, that the complaining witness, Bertha Kaminski, had, since the time at which she claimed the offense was committed, told Mary Kehoe that the accused was not guilty of a rape upon her, but that she (Bertha) wanted to make some money out of him; and upon said Mary Kehoe answering that the accused had no money, the said Bertha replied that he had rich relations, and was connected with the city government, and that accused or his friends would pay her well to drop the prosecution.

The court overruled the motion for continuance, and ordered the trial to proceed, which resulted in a verdict of guilty, and fixed the punishment at five years in the penitentiary.

The court overruled a motion for a new trial, and gave judgment in accordance with the verdict. These matters, together with the evidence and rulings of the court upon the trial, are presented in a bill of exceptions, and the case brought here by writ of error.

By our practice, error may be assigned upon overruling a motion for continuance as well as for a new trial.

If the affidavit for a continuance presented a proper case, it was error to overrule the application. The essential requisites for such affidavit are these:

*First.* The name and residence of the witness; that he is really material, and shown to the court, by the affidavit, to be so.

*Second.* That the party who applies has been guilty of no neglect, or, in other words, shows the exercise of proper diligence.

*Third.* That the witness can be had at the time to which it is sought to have the trial of the cause deferred.

If the facts set forth in the affidavit of the accused, which he expected to prove by the absent witness, were really material,

and shown to the court to be so, then this affidavit was sufficient, because in all other respects it is so clearly and manifestly within the rules as to admit of no criticism. The question, and the only question arising upon this affidavit is, the materiality of the facts expected to be proven by the absent witness, and *that* scarcely admits of argument. The affidavit shows that accused knew of no other witness by whom these facts could be proven. The indictment was for rape upon Bertha Kaminski, and the affidavit shows what is but an ordinary presumption, from the indictment itself, that she was the complaining witness. It was apparent therefore, and to be expected, that she would be the only witness in support of the charge; and as the law closes the lips of the defendant, his only hope of defense, if innocent, consisted in controverting the evidence of the fact of the force, adduced by her, by means of cross-examination, impairing her credibility by disproving circumstances stated by her, or showing declarations made by her out of court inconsistent with her evidence upon the witness stand. "It is to be remembered," says Greenleaf, "as has been justly observed by Lord Hale, that it is an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent." 3 Greenl. Ev., sec. 212.

When the nature of the charge is considered, and the various motives which may, and doubtless in many instances have, actuated women to make unfounded charges of this character, as, for revenge, to extort money, as an excuse on their part for a sin of a less odious character, is it not obvious that evidence introduced, upon a proper foundation being laid, that the prosecutrix had declared that the accused was not guilty, had admitted that the prosecution was carried on for the sole purpose of extorting money, would be material? The proposition does not admit of controversy, and it was manifest error to overrule the motion of plaintiff in error for a continuance.

The second error assigned is, that the court excluded proper evidence offered in behalf of the defense, viz.: Evidence tending to show that the prosecutrix, prior to the time in question, had had carnal intercourse with other men. It is the general rule that the character of the prosecutrix for chastity may be impeached, but this must be done by general evidence of her reputation in that respect, and not by evidence of particular instances

of unchastity. *Rex v. Clarke*, 2 Stark., 241; *Rex v. Barker*, 3 C. & P., 589; *The People v. Abbott*, 19 Wend., 192. The latter case holds that the prosecutrix may be shown to be in fact a common prostitute; that previous voluntary connection between her and the prisoner may be shown, and that evidence may be given of particular acts and associations indicating, on her part, a want of chastity. The admissibility of all this class of evidence is placed upon the ground that an unchaste woman would be more likely to consent to the act than a virtuous one, and therefore her previous connection with the accused, or her general reputation for want of chastity, are proper ingredients in determining the question whether the particular act in controversy was accomplished solely by force, or with her virtual consent.

In this case, however, the question arises in a wholly different aspect. The prosecutrix does not, nor does any other witness, testify to the commission of a rape or any carnal intercourse at the time in question.

She says she became insensible, and does not know whether the accused consummated the act or not; and to supplement this lack of direct evidence, the state's attorney called as a witness a physician, who examined her, three weeks after the alleged occasion, and who gives it as his opinion that she did not then bear the physical evidence of virginity, and had had carnal intercourse with some man, by means of which such evidences were destroyed.

Upon this, of course, it was argued that they were destroyed by the accused, and by a forcible carnal connection with her, although she knew nothing about it, she being, as she claims, unconscious at the time.

Such being the state of the case, was it not competent to rebut that inference by showing either a previous voluntary connection with the accused, or particular instances of unchastity with any other man? The circumstances of the case seem to take it wholly out of the general rule, which excludes evidence of particular instances of unchastity with persons other than the accused. The prosecution was required to satisfy the jury, beyond a reasonable doubt, that the crime had been in fact committed. This could not be done upon the evidence of the prosecutrix alone. She could not so testify. She said she did not

know whether it was committed or not. The testimony of the doctor as to the physical *indicia*, that she had had carnal intercourse with some man was, therefore, vital. It must have been the controlling circumstance from which the criminality of the accused was inferred. Now, can it be maintained that, although such a circumstance may be given in evidence to criminate the accused, yet, if he cannot account for such physical *indicia*, except by showing particular instances of unchastity with persons other than himself, he shall not be allowed to do it at all? The law is not so unreasonable. The right of the accused to defend must be as broad as that of the prosecution to criminate. If such a circumstance is admissible for the purpose of an inference of criminality, then it must be competent to explain or account for the circumstance itself, by showing that it existed from causes entirely independent of the alleged criminal act of the defendant. In order to explain or account for these physical *indicia*, it was competent for the accused to introduce any legitimate evidence tending to show either a voluntary connection between the prosecutrix and himself, or any other man, prior to the time of the examination by the doctor. And he should, moreover, be at liberty to show, if he can, by other medical testimony, that the theory of the doctor was unreliable.

The counsel for plaintiff in error sought to lay the foundation for an inference of voluntary intercourse between him and the prosecutrix, while she lived at the house of his step-father, by inquiring of the latter as to her habits of following plaintiff in error about the house.

Upon this evidence being objected to by the state's attorney, the court said: "I do not think it competent, and even if she did follow him, it would not show *she wanted a rape committed upon her*," and the evidence was excluded. The evidence was offered for a legitimate purpose, and might have been competent as a preliminary inquiry. The remark of the court could not have been otherwise than prejudicial to the accused, and was not proper even if the evidence was properly excluded. *Fisher v. The People*, 22 Ill., 283.

The judgment of the court below will be reversed and the cause remanded.

*Judgment reversed.*

## BOXLEY vs. COMMONWEALTH.

(24 Gratt., Va., 649.)

RAPE: *Evidence—Surprise.*

The evidence set forth in the opinion in this case was held insufficient to sustain a conviction for rape.

Where the testimony of the principal witness for the prosecution, on the trial, varies materially from that given by her before the committing justice, who was unexpectedly absent from the trial, the prisoner is entitled to a new trial on the ground of surprise.

At the July term of the county court of *Halifax*, Wilson Boxley, colored, was indicted for a rape upon Martha H. Spencer. At the same term of the court he was brought to the bar, and being arraigned, pleaded not guilty, and on his motion the case was continued. He was thereupon remanded to the circuit court of the county for trial at the September term; and on his motion, he was allowed to give bail for his appearance at the circuit court.

At the September term of the circuit court, Boxley appeared, and, upon his trial, was found guilty by the jury, who assessed the term of his imprisonment in the penitentiary at two years. The prisoner thereupon moved the court to set aside the verdict and grant him a new trial, on the ground of surprise, and because the verdict was contrary to the evidence; and he filed his own affidavit and the affidavit of H. B. Melvin, the justice who committed him, to show that the principal witness had varied materially in her evidence before the jury from her statements before the committing justice.

The court overruled the motion, and sentenced the prisoner in accordance with the verdict, and the prisoner excepted; and upon his application a writ of error was awarded.

The facts are sufficiently stated in the opinion of the court.

*Davis*, for the prisoner.

*The Attorney General*, for the commonwealth.

BOULDIN, J. Several objections have been taken by the counsel for the plaintiff in error to the judgment of the court below in this case, involving questions of both law and fact, and have been argued with much learning and ability; but in the view taken of the case by this court, we deem it necessary to consider

only the questions arising under the last assignment of error. After the jury had rendered a verdict of guilty, and fixed the term of the prisoner's confinement in the penitentiary at ten years, he moved the court to set aside the verdict and award him a new trial, on the following grounds:

1. Because the verdict had been obtained by surprise.
2. Because it was not sustained by the evidence.

The court overruled the motion, and sentenced the prisoner to ten years' confinement in the penitentiary. To this ruling the prisoner excepted, and prayed the court to certify the facts proved on the trial, which was done accordingly.

We are of opinion that the circuit court erred in refusing, under all the circumstances of the case, to grant the new trial.

Without recapitulating or very critically analyzing the testimony, we are compelled to say that the evidence adduced to establish the felonious act — the *corpus delicti* — is, to say the least of it, of a very doubtful and inconclusive character. It consists exclusively of the statements of the person upon whom the offense is charged to have been committed, and is certified by the court as follows: "On the — day of June 1873, it being Sunday, about 12 o'clock M., Miss Martha Spencer was at the spring (which is about one hundred yards from her father's house), had filled her bucket and was sitting down on a rock at the spring; while sitting there, some one came up behind her and seized her by the shoulders, pulled her over backwards, her bonnet falling over her eyes; the person making the attack spoke to her in a low tone, and told her "not to make a noise" (a suggestion which, for some reason, she seems to have duly respected). "She screamed once" (whether in a similar tone or not does not appear); "but the bonnet was held over her mouth and eyes so that she was unable to make further outcry, and could only catch a glimpse of her ravisher. *Her arms were not confined*, and she made an attempt to pull the bonnet away from her eyes. She was very weak and nervous, and very much frightened, and, notwithstanding her resistance, he accomplished his purpose, and ravished her."

This is her own account of the alleged criminal act, and it is all we have directly on that subject. She proves no other violence than enough to draw her backwards by the shoulders from her seat, and to hold her bonnet over her face. Her person was

examined by two physicians, and whilst they both testified that it was apparent that she had had recent sexual intercourse, they also proved that there was nothing to indicate that it had been accomplished by violence; "that no bruises were found about the face, arms or person of the prosecutrix, except a small, almost imperceptible bruise under each knee."

It was also proved that Miss Spencer was "a large, stout woman," and the accused was a *medium* sized man, about twenty-three years old.

Can we say, upon such testimony, that the criminal act has been established? It would require a large degree of charity and credulity to believe that at noonday, within one hundred yards of her father's house, and within two or three hundred yards of the house of a neighbor (William Spencer), a rape was perpetrated on this large and stout woman, *with both her arms perfectly free*, by a *medium*-sized man, who neither threatened her with violence nor did anything to disable her, and who, from her own account, had the use of but one arm, the other being employed in holding her bonnet over her face whilst the act was committed; and that all this had been accomplished with no noise to alarm the families which were so near; with not the slightest indication, from the appearance of the ground, that there had been a scuffle; and with no scratch or bruise on the person of the female, to show that her chastity had not been violated without a struggle! Such testimony we think exceedingly weak, to say the least of it, to show that a rape had been committed at all, especially when it appears in the record that the accused, who lived at her father's house, had previously, in his kitchen, attempted to take improper liberties with Miss Spencer, which she does not appear to have disclosed or resented.

But conceding the rape to be established, the evidence to connect the accused with the act is yet more doubtful and unsatisfactory. Although the accused had resided at her father's house for a year or two previous to the occurrence, and was, of course, well known to the witness — voice, features, gestures and person, — yet she does not swear to his identity. He spoke to her with his face very near to hers, yet she does not say that she recognized his voice. She says she only caught a "glimpse of the lower part of his face," and only saw his back "at a distance of about fifty or a hundred yards, running away." What she



was doing from the time he left her person until he reached the distance of fifty or one hundred yards, does not appear; yet, when she did see him, she seems to have been perfectly cool and collected, for she can tell that he wore a dirty shirt and a *black felt hat*. She says that, from the glimpse she had of his face, and the sight she had of his back as he ran away, *she believed it was the prisoner*. And this was all the evidence of identity, except the evidence of William Spencer, who lived about two or three hundred yards from the home of the prosecutrix. He proves that he saw, on what day and at what hour does not appear, a man whom he took to be Wilson Boxley, walking very rapidly along the road leading from Bannister Spencer's, and now and then looking backwards. He called to him and asked, "What's your hurry?" but received no answer. He was one hundred yards off, and witness was not sure it was Boxley. "The man he saw wore a *white chip hat*," not a *black felt hat*, as proved by Miss Spencer to have been worn by the person who assailed her.

It was further proved that the accused lived about two miles from the home of Miss Spencer, and that he remained at his work as usual for three or four days after the occurrence at the spring, when he was charged with this offense by the brothers of Miss Spencer, and beaten by them. He then went to the court house and caused a warrant to be issued against them; and it was not until after these proceedings that the present prosecution was commenced. We think the evidence wholly insufficient to identify the prisoner as the guilty party. Were this not so, the evidence, to say the most of it, leaves the question of identity extremely doubtful, and, under the circumstances, the verdict of the jury should have been set aside, and a new trial awarded, to allow the accused the privilege of introducing the testimony set forth in his own affidavit and that of Dr. Melvin, of which he was evidently deprived by surprise.

Dr. Melvin's testimony, as set forth in his affidavit, would still further have weakened the testimony on the question of identity. He was the committing magistrate, and the testimony of Miss Spencer, as detailed by him, is materially variant from her testimony in court; and the facts set forth in the prisoner's affidavit satisfactorily explain his failure to have Dr. Melvin before the court. Under all the circumstances, this court is of opinion that

the court below erred in refusing to set aside the verdict and to award the prisoner a new trial.

As the cause must be remanded to the circuit court, it becomes necessary to dispose of the objection to the jurisdiction of that court, so earnestly and ably argued at the bar.

The objection was, that as the law stood on the 28th July, 1873, when the case was transferred from the county to the circuit court, the prisoner had a right to be tried in the county court in which his case was pending, or, at his election, to be sent for trial to the circuit court; that he did not elect to be tried in the latter court, and therefore his case was never legally pending in that court.

It is certainly true that on the 25th of July, 1873, the prisoner had a right to be tried in the county court, where his case was pending; but it is equally true that the county court had then undoubted authority, on the election of the prisoner or by his consent, to transfer the case to the circuit court. It is furthermore true that on the 1st day of August thereafter, the jurisdiction of the county court to try the case would cease; and by the mandate of the law it would, without the prisoner's consent, be transferred to the circuit court. On the prisoner's motion, the case had already been continued to the next term of the court, and his right to be tried in the county court was, in effect, forever gone, for in three days the new law, depriving the county courts of jurisdiction in the case, would go into effect. This was all well known to the court and to the counsel on both sides, and it is reasonable to conclude that, acting on that knowledge, the transfer to the circuit court was made with the consent and approbation of the accused. We think so, because, under the circumstances then existing, it was manifestly to his interest to give that consent, and because he not only made no objection whatsoever to the transfer, but immediately thereafter applied to be allowed to give bail for his appearance in the circuit court, which was allowed him and was given; and because he appeared in that court in discharge of his recognizance, and submitted to his trial without indicating the slightest objection to the jurisdiction of the court. He was, in fact, exactly where he would have been had no transfer been made, with the advantage of a full opportunity to meet the charge in the court in which it was absolutely

necessary, under the law, which was just about to go into effect, that he should be tried.

Under such circumstances, we are fully justified in reaching the conclusion that the transfer was in fact made with the prisoner's consent, and the circuit court therefore had jurisdiction. We arrive at this conclusion the more readily because it is now evidently to the advantage of the prisoner. He must be tried in the circuit court, and is now in confinement, and it might seriously prolong that confinement were he compelled to go through the inconvenience and useless form of sending the case to the county court, to be by that court immediately sent back where it now is.

The judgment of the circuit court must be reversed, the verdict set aside, and a new trial awarded.

NOTE. — In *People v. Dohring*, 59 N. Y., 374, which was a prosecution for rape, the defendant's counsel asked the court to charge the jury, "that they must be satisfied from the evidence, before finding the prisoner guilty, that the prosecutrix resisted him to the extent of her ability on the occasion. The court declined to charge the jury in these words, but did charge that the act must have been done by force, and against the will and resistance of the prosecutrix without saying how forcible and continued, or how feeble and yielding that resistance might be." On this head the court of appeals say that although the charge was sound law, that "coupled with the refusal to charge as requested, it failed to express all that was necessary for the jury to find. The resistance must be up to the point of being overpowered by actual force or of inability from loss of strength longer to resist, or from the number of persons attacking, resistance must be dangerous or absolutely useless, or there must be duress or fear of death." It was held that the refusal to charge as requested was error.

This case contains a full citation of authorities sustaining the decision on this head.

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#### PEOPLE vs. CLARK.

(33 Mich., 112.)

SEDUCTION: *Election — Practice — Evidence.*

On the trial of an information for seduction, containing three counts, covering three distinct transactions, the prosecution will not be allowed to go to the jury on more than one act, and having introduced evidence tending to prove one of the acts charged, this will be treated as an election, and thereafter no evidence as to the other acts charged is admissible.

On a trial for seduction, evidence of illicit intercourse between the parties, subsequent to the alleged seduction, is irrelevant and inadmissible.

To constitute the crime of seduction, the woman must, relying upon some sufficient promise or inducement, be drawn aside from the path of virtue she was honestly pursuing at the time the offense charged was committed. Where the evidence showed that the parties had illicit intercourse whenever opportunity offered, a promise of marriage at any such acts would not make the act seduction.

On the trial of an information for seduction, the chastity of the female at the time of the alleged seduction is involved, and the defendant has a right to ask her on cross-examination, whether, prior to the alleged seduction, she had had illicit intercourse with another.

On the trial of an information for seduction, it is competent for the defense to give evidence to show a plan between the female, her father and mother, to inveigle the defendant into a marriage, and, failing, to prosecute him.

It is proper to prove by medical experts, that acts of sexual intercourse, which had been testified to, were, owing to the situation of the parties, i. e., in a buggy, and the pain which would have resulted, highly improbable, if not impossible.

#### EXCEPTIONS from *Calhoun Circuit*.

*Anderson J. Smith*, Attorney General, for the people.

*John C. Fitzgerald* and *C. I. Walker*, for respondent.

MARSTON, J. The defendant was convicted for the seduction of Alice J. Morey. There were three counts in the information: the first charged him with committing the offense on the 28th day of July, 1873, in the county of Calhoun; the second, with the commission of a like offense, on the same day, in the township of Penfield, in said county, and the third, with a like offense, under and by means of a promise of marriage, on the same day, in the county of Calhoun.

Upon the trial, the prosecution introduced the complaining witness, who gave evidence tending to prove an act of seduction, in the town of Penfield, July 28, 1873. The prosecution then offered to prove a distinct and subsequent act of seduction, stating, for the first time, that they relied upon this instance, and not the one already proven, for conviction. This was objected to, but admitted, the court remarking that the prosecution would have to elect one particular act or transaction to put before the jury. The prosecution then offered to prove a third distinct act, which occurred subsequent to the first act, proven to have taken place in the town of Penfield, but prior to the second act already proven. This was also objected to, but admitted.

After the close of the argument, but before the court charged

the jury, the prosecuting attorney stated to the court, in the hearing of the jury, that he relied upon the last act of intercourse, which was the second proved, and that if the court desired him to elect, he would elect that act; no election, however, was made; and the court charged the jury that it was sufficient if the prosecution had proved the offense committed at any time within a year prior to the 24th of June, 1874, that being the time when the prosecution was commenced; and refused to charge, that the prosecution having first put in evidence tending to show that the defendant committed the offense in Penfield, on the 28th of July, they were not at liberty to prove any subsequent offense committed elsewhere for any purpose; and that the jury could not consider the evidence of such subsequent offense for any purpose whatever.

It was decided in *People v. Jenness*, 5 Mich., 327, that the prosecution, before the evidence was introduced, could select any one act of criminal intercourse, such as was charged in the information, which occurred within the jurisdiction of the court, and within the statute of limitations, but when evidence had been introduced tending directly to the proof of one act, for the purpose of procuring a conviction upon it, the prosecutor had thereby made his election, and could not be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause.

Upon this question we consider the ruling in that case decisive. The act alleged to have been committed in the buggy, in the town of Penfield, being the first to which evidence was introduced, was the only offense upon which the defendant could be tried; and if proofs of subsequent acts were admissible at all, they could not be admitted as distinct offenses to go to the jury, and upon which the defendant might be convicted. It was not necessary for the prosecution to expressly elect for which act they would try the defendant in order to bind them. The fact of their introducing evidence tending to prove a distinct substantive offense, was a sufficient election. In this case under the charge as given, there was no certainty whatever that the jurors all united upon the same act in finding the defendant guilty.

Nor could the prosecution, after having thus introduced evidence tending to show an offense committed in the town of Penfield, on the 28th of July, show subsequent acts as corroborating

testimony, as they could have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense. *People v. Jenness, supra*; *Templeton v. The People*, 27 Mich., 501; *The People v. Schmeitzer*, 23 Mich., 304.

There is still another serious objection to the prosecution relying upon the second or third act proven in this case for a conviction. It appeared from the testimony of the complaining witness that the first offense was committed, if at all, on the 28th of July, 1873; that the second and third offenses were committed, if at all, during the month of August following, but at what particular time, she was unable to state. And upon cross-examination she gave testimony tending to prove several distinct acts of intercourse, in all instances connected with a promise of marriage, in the months of July and August, and all subsequent to the 28th of July.

Illicit intercourse alone would not constitute the offense charged. In addition to this the complainant, relying upon some sufficient promise or inducement, and without which she would not have yielded, must have been drawn aside from the path of virtue she was honestly pursuing at the time the offense charged was committed. Now, from her own testimony it would seem that the parties had illicit intercourse as opportunity offered. "Such is the force and ungovernable nature of this passion, and so likely is its indulgence to be continued between the same parties, when once yielded to, that the constitution of the human mind must be entirely changed before any man's judgment can resist the conclusion," that where parties thus indulge their criminal desires, it shows a willingness upon her part that a person of chaste character would not be guilty of, and that although a promise of marriage may have been made at each time as an inducement, it would be but a mere matter of form, and could not alone safely be relied upon to establish the fact that she would not have yielded, had such a promise not been made.

We do not wish to be understood as saying that, even as be-

tween the same parties, there could not be a second or even third act of seduction; but where the subsequent alleged acts follow the first so closely, they destroy the presumption of chastity which would otherwise prevail, and there should be clear and satisfactory proof that the complainant had in truth and fact reformed, otherwise there could be no seduction. The object of this statute was not to punish illicit cohabitation. Its object was to punish the seducer, who, by his arts and persuasions, prevails over the chastity of an unmarried woman, and who thus draws her aside from the path of duty and rectitude she was pursuing. If, however, she had already fallen, and was not at the time pursuing this path, but willingly submitted to his embraces as opportunity offered, the mere fact of a promise made at the time would not make the act seduction.

Nor will illicit intercourse which takes place in consequence of, and in reliance upon a promise made, make the act seduction. If this were so, then the common prostitute, who is willing to sell her person to any man, might afterwards make the act seduction, by proving that she yielded relying upon the promise of compensation made her by the man, and without which she would not have submitted to his embraces. Illicit intercourse, in reliance upon a promise made, is not sufficient, therefore, to make the act seduction. The nature of the promise, and the previous character of the woman as to chastity, must be considered. And although the female may have previously left the path of virtue on account of the seductive arts and persuasions of the accused or some other person, yet if she has repented of that act and reformed, she may again be seduced. We do not say that there may not have been a reformation in this case; indeed there may have been many, but they were unfortunately fleeting. Had a reasonable time elapsed between the different acts, a presumption in favor of a reformation might arise, but we think no such presumption could arise in this case, and that the burden of proving such would be upon the prosecution.

In this connection we may discuss another question raised. Upon cross-examination of the complaining witness, she was asked whether previous to this time she had ever had connection with any other man. This was objected to as irrelevant, and the objection was sustained. It does not clearly appear from the record what particular time the question referred to, whether to a



time previous to the first alleged act of intercourse with the defendant, or previous to the trial. If the latter, the ruling was clearly correct. *People v. Brewer*, 27 Mich., 134. If the former, then we think the question, under the objection made, was proper. In the examination of this question, and also of the one last discussed, we have derived but little benefit from an examination of the authorities. Seduction was not punishable by indictment at common law, and the cases which discuss these questions are all under statutes which differ in some respects from ours.

In most of the states their statute makes the seduction of a woman of "previous chaste character" an indictable offense, while there are no such words, nor any of like import, in ours; and the courts have held that the words "previous chaste character" mean that she shall possess actual personal virtue, in distinction to a good reputation, and that a single act of illicit connection may therefore be shown on behalf of the defendant. If, however, we are correct in what we have already said upon the question as to what is necessary to make an act of illicit intercourse seduction, then the chastity of the female at the time of the alleged act is in all cases involved, and the presumption of law being in favor of chastity, the defense have a right to show the contrary. This upon principle we consider the correct doctrine, and that it necessarily follows from what we have said upon the other question. As bearing upon these questions, we refer to *Carpenter v. The People*, 8 Barb., 603; *State v. Shean*, 32 Iowa, 88; *Kenyon v. The People*, 26 N. Y., 203; *State v. Carron*, 18 Iowa, 372; *Andre v. The State*, 5 id., 359; *Boak v. The State*, id., 430; *Cook v. The People*, 2 Thompson's C. (N. Y.), 404; *Crozier v. The People*, 1 Harris C. C., 453; *Safford v. The People*, id., 474; *State v. Sutherland*, 30 Iowa, 570.

The defense offered to prove that during the examination of the defendant for this offense, the complainant was present but was not examined. This was excluded, and we think rightly. The complaining witness, of her own motion, could not take the stand as a witness upon that examination. The prosecuting attorney need not necessarily be present, but even if he were, we think at that stage of the proceedings, he must have some discretion given him as to what witnesses he should call, and this omission to call any particular witness cannot be made a subject of criticism upon the trial in the circuit.

The defense also offered certain evidence tending to show a plan between the complainant, her father and mother, to inveigle the defendant into a marriage with the complainant, and failing, to prosecute him. This was their theory of the case, and for this purpose the evidence was admissible. This is an offense where it is very difficult for the defense to present any direct evidence to disprove the charge, as third parties are not usually called in to witness such transactions, although in this case, it does appear that complainant's mother did find them in bed together on one occasion. She, however, whether discreetly or not, kept silent and did not communicate that fact to her husband or any one for nearly a year thereafter. We think the facts offered by the defense tended to support their theory, and they had a right to have them presented to and considered by the jury, as bearing upon the question whether the offense charged had been committed or not.

Medical witnesses were called to testify, that in their opinion intercourse, under the circumstances described by the complainant,<sup>1</sup> was highly improbable, if not impossible, and also to the pain and suffering the complainant would have experienced had such an act taken place. As already said, the defense is a difficult one to prove, no matter how innocent the accused may be, more especially where the parties have been in each other's company, and thus apparently an opportunity has been given to commit such an offense. The time the parties were together, the particular place, and the probabilities arising therefrom of their being caught in the act, their position and their opportunities while together, all or any of these may render it highly improbable, if not impossible, that such an offense was really committed. And although counsel in their argument might draw the same conclusion as a medical expert would from the facts proven, yet they are not bound to rely upon this, but may call competent parties to testify upon that subject.

To establish the fact that the prosecution was commenced within one year, the warrant issued by the magistrate was offered in evidence, but objected to, first, because it did not appear in evidence that the complaint referred to therein was in writing; and second, that the warrant itself would not be evidence of the commencement, but would only be evidence when coupled with

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<sup>1</sup> In a buggy.

the examination and return of the magistrate. The evidence and return of the magistrate was afterwards offered in evidence, which disposed of the second objection. And as to the first, the statute does not require a complaint in writing. The issuing of the warrant in good faith, and delivery to an officer to execute, is a sufficient commencement, if it appears that the defendant was afterwards arrested upon that warrant and bound over for trial.

A question was raised that as but one offense was charged in the warrant, no other offense could be set forth in the information. The defendant, by pleading to the information, waived any such question that he might have raised thereto.

Questions were also raised as to the charge of the court relative to the effect of good moral character, and some others which are not likely to arise again, under previous decisions of this court, which seem to have been overlooked, and we do not consider it necessary, therefore, to discuss them.

The conviction should be set aside, and a new trial granted, and directions given to the court below accordingly.

The other justices concurred.

NOTE. — In *Wood v. State*, 48 Ga., 192, which was an indictment for seduction, the evidence for the prosecution tended to establish this case. The respondent was a teacher and also a minister. He was married, and his wife and family lived with him. The girl seduced was about sixteen years of age, a pupil of the respondent and a member of the church of which he was pastor. She knew that the respondent was married. The respondent gained her confidence and affection, and then by means of the influence which he had acquired over her, and by persuasions and arguments, managed to seduce her. The evidence is reported in full in the case; and the testimony of the seduced girl shows very clearly the successive steps by which her ruin was accomplished. Among other things, she testified that the respondent told her his wife was not likely to live long, and when the wife died he would marry her. On the part of the respondent, it was urged, that on these facts, the respondent could not be convicted of seduction; that "a man who is known to the female alleged to be seduced to be a married man, living and cohabiting with a lawful wife, cannot be guilty of the crime of seduction." On this point, the court use the following language: "That a married man may be guilty of seducing, by false and fraudulent means, a woman who knows he is married is, we think, incontestible. He may gain her confidence in many ways. He may be her guardian, her near kinsman. He may, as is charged in this case, be her teacher and spiritual adviser; she may honestly and chastely honor, confide in and trust him. She may look to him as the fountain of truth and purity, so that his acts, his words and his opinions shall be to her as those of a God. Under such a state of circumstances, the girl is as much a victim as though her confidence were the product of that tender and confiding rela-

tion existing between plighted lovers, bound by pledges to be consummated at the altar of marriage. Indeed, as all experience has proven, the influence which a priest may acquire over a devotee is, perhaps, of all others the most complete, and whilst she may by it be led to a purer life and to a holier condition, it is possible that she may be led by it blindfold into sins of the deepest die."

The statute on which the prosecution was based is in these words: "Any person, who by persuasion and promise of marriage, or by any other false or fraudulent means, shall seduce a virtuous, unmarried female," etc. All statutes against seduction, refer to the seduction of virtuous females, indeed, there could be no seduction of an unchaste female. But precisely what constitutes a virtuous (or chaste) female has been a subject of difference. In this case, the trial judge instructed the jury as follows: "It must appear from the testimony, that she was, at the date of the alleged seduction, a virtuous, unmarried female. The test is to be applied to her at that date, and not at a subsequent period. The presumption of the law is that she was virtuous, and that presumption remains until removed by the proof. She must have had personal chastity. If she, at that time, had never had unlawful sexual intercourse with man; if no man had then carnally known her, she was a virtuous female within the meaning of this law. If man had then carnally known her, had had unlawful sexual intercourse with her, she was not a virtuous female within the meaning of this law." This instruction was held to be error. The supreme court say: "Virtue is a thing of the heart and mind. A woman who has been guilty of fornication has done an act showing that she is not of a virtuous heart, or, at least, that she was not at the time of the act. The evidence, it is true, is very conclusive, but it does not at all follow that she is a virtuous woman because she has not broken the law, no more than it follows that a man is honest because he has not violated the law against stealing.

To be guilty of the crime of seduction is one thing, and to induce a woman to commit fornication is another. The crime of seduction involves purity of heart and a chaste mind in the woman seduced. She must be *led away* from virtue. The definition of the judge would exclude a woman, who, years before had been guilty of fornication, but who had repented and was now perfectly virtuous; perhaps the more so that she had once sinned and repented in sackcloth and ashes. And this definition of a seducible woman is, as I believe, contrary to the general sense of the word, as used both in England and America." Warner, C. J., dissented, and thought there was no error in the instruction of the circuit judge.

In *State v. Timmens*, 4 Minn., 325, the following instruction was held to be correct: "That if the jury find that the defendant had carnal intercourse with the witness at the time and place in the indictment charged, under a promise to marry, the jury may convict, although she may have had carnal connection with the defendant previously, provided she had reformed and was chaste at the time of the commission of the offense."

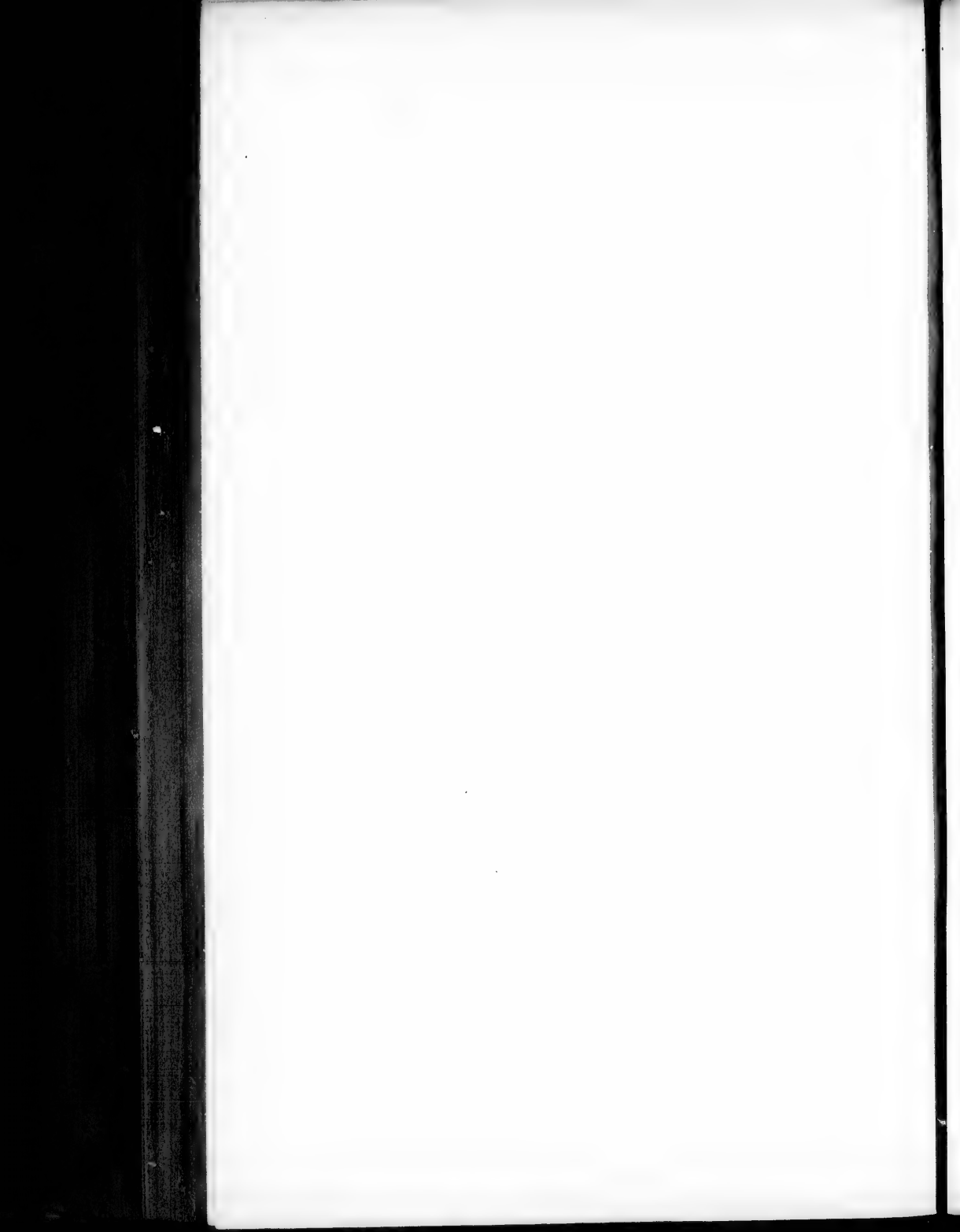
In *State v. Carron*, 18 Iowa, 372, in which case a number of authorities are collected, the same doctrine is laid down.

The principal case makes allusion to the case of *People v. Millsbaugh*, 11 Mich., 278, but it must be regarded as substantially overruling it. In that case it appeared that the parties first had sexual intercourse under circumstances that constituted the act a seduction in July, 1860. That such intercourse was renewed at short intervals under renewed promises of marriage each time until December,

1861. That the same course of conduct was continued between the parties until March, 1862, when the prosecutrix became pregnant. The defendant was charged with seduction in March, 1862, and convicted. The defense was, that, as the uncontradicted evidence showed that the seduction took place in July, 1860, more than one year before the time laid in the information, the offense was barred by the statute of limitation, which, in Michigan, requires a prosecution to be begun within one year after the commission of the offense. The court held that there was no error in submitting the case to the jury under this charge: "that if the jury believe that the prisoner had sexual intercourse with said Mary Taylor on March 3, 1862, \* \* \* under and in consequence of a renewed promise of marriage, then at the time made, the offense was complete, and they may find the prisoner guilty."

On a review of the cases, the doctrine as to what constitutes a seduction may be thus stated: The prosecutrix must at the time be of chaste character. Although she may have previously fallen, if she is then honestly pursuing the path of virtue and is of pure mind and heart, this constitutes chaste character, while she may be unchaste, without ever having been guilty of illicit sexual intercourse. The prisoner must have had illicit intercourse with her, seduction *ex vi termini* implying sexual intercourse (*State v. Bierce*, 27 Conn., 319), and such illicit intercourse must have been obtained by means of a control over the mind, will or affections of the prosecutrix obtained by the seducer, and, after obtaining such control, by persuasions, arguments or inducements held out. Many of the states, as in New York, require the seduction to be under a promise of marriage. Of course under such a statute no conviction could be had for seduction where the prosecutrix knew that the defendant was married at the time of the promise, and this was so decided in *People v. Alger*, 1 Park. Crim. Rep., 333. But where the statute, as in Michigan, simply provides that "whoever shall seduce and debauch any unmarried woman, shall be punished, etc.," no promise of marriage is necessary. It is sufficient that the respondent by his arts having obtained a control over the mind, will or affection of the prosecutrix, uses his power to lead her away from the path of virtue which she is at the time honestly pursuing. Besides the cases already cited, see also *Andre v. State*, 5 Iowa, 389; *Boak v. State*, id., 430; *Carpenter v. People*, 8 Barb., 603; *Com. v. McCarty*, 4 Penn. Law Jour., 136; 2 Whart. Am. Crim. Law, §§ 2672 and 2673, and cases there cited.

The supreme court of Wisconsin in *Croghan v. State*, 22 Wis., 444, which was a prosecution for seduction, in defining the difference between seduction and rape, use this language: "But the word 'seduction,' when applied to the conduct of a man towards a female, is generally understood to mean the use of some influence, promise, arts, or means on his part, by which he induces the woman to surrender her chastity and virtue to his embraces. But we do not suppose that it must appear that any distinct promise was made to the female, or any subtle art or device employed. It is sufficient that the means used do accomplish the seduction, and induce the female to consent to the sexual intercourse. Perhaps the motive of fear on the mind of the female is not to be excluded — not the fear of personal violence and injury unless she consent to the connection, but a fear that the man may in some way injure her reputation or standing in society, unless she yields to his importunities. But the woman must be tempted, allured, and led astray, from the path of virtue, through the influence of some means or persuasion employed by the man, until she freely consents to the sexual intercourse."



# INDEX.

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## ABDUCTION UNDER MISTAKE OF FACT.

The prisoner was convicted under 24 and 25 Vic., ch. 100, sec. 55, of unlawfully taking an unmarried female under the age of sixteen years out of the possession and against the will of her father. It was proved that the prisoner did take the girl, and that she was under sixteen, but that he *bona fide* believed, and had reasonable ground for believing, that she was over sixteen: *Held*, by Cockburn, C. J., Kelly, C. B., Bramwell, Cleasby, Pollock, and Amphlett, BB., Blackburn, Mellor, Lush, Grove, Quain, Denman, Archibald, Field and Lindley, JJ., Brett, J., dissenting, that the latter fact afforded no defense, and that the prisoner was rightly convicted. *Reg. v. Prince*, 1

## ABDUCTION FOR PROSTITUTION.

1. The indictment charged the abduction of "a female, etc., for the purpose of having illicit sexual intercourse with her." The statute is against abduction "for the purpose of prostitution." *Held*, that the indictment charged no offense under the statute, and should have been quashed. *Osborn v. State*, 25
2. *Prostitution—Illicit intercourse.*  
Prostitution means common, indiscriminate illicit sexual intercourse, and not illicit sexual intercourse with one man only, *Ibid.*
3. *Chaste character.*  
A statute against the abduction of females of "previous chaste character" means, actual personal virtue in distinction from a good reputation. *Lyns v. State*, 23
4. *Evidence.*  
On the trial of an indictment founded on a statute against the abduction for prostitution of females of previous chaste character, it is admissible to prove previous particular acts of illicit intercourse on the part of the female abducted. *Ibid.*

## ABORTION.

1. *Statute construed—Intent.*  
The respondent was convicted on an indictment charging him with feloniously beating and striking a pregnant woman with intent to cause her to miscarry. The statute under which the indictment was found is as follows:  
"Whoever, by means of any instrument, medicine, drug, or other means



means whatever, causes any woman pregnant with child to abort or miscarry," etc.: It was held, that the statute only applies to those who intend to produce an abortion. *Slattery v. People*, 29

2. *Evidence.*

The evidence in this case was held insufficient to justify a conviction. *Ibid.*

ACCOMPLICE.

1. One who purchases stolen goods from a thief, with money furnished by an officer, with a view of bringing the thief to justice, is not an accomplice. *People v. Barrie*, 178

2. *Corroboration of accomplice.*

On a trial for felony, a conviction cannot be had on the testimony of an accomplice, unless such testimony is corroborated, and the corroboration must be as to some fact or circumstance tending to connect the respondent with the crime. It is not sufficient that the evidence of the accomplice is corroborated by facts which tend to show the commission of the crime, and that the accomplice was concerned in it. *Middleton v. State*, 194

3. *Same.*

What credit is to be given to the testimony of an accomplice, whether corroborated or uncorroborated is a matter exclusively within the province of the jury. *Hamilton v. People* (and see note, p. 635), 618

4. *Waiver of privilege.*

Where an accomplice volunteers to testify in a criminal case, he must testify fully and may be compelled to testify as to statements made by him to his counsel with regard to the case, and it seems that the counsel may also be compelled to testify as to such statements. *Ibid.*

ADMISSIONS AND CONFESSIONS.

1. *Confessions.*

The person with whom a prisoner had been living for two years said to him, "Tom, this is mighty bad; they have got the dewl wood on you and you will be convicted," and at the same time said something about "owning up." The prosecutor said to the prisoner, "You are very young to be in such a difficulty as this; there must have been some one with you who is older, and I, if in your place, would tell who it is; it is not right for you to suffer the whole penalty and let some one who is guiltier go free; it may go lighter with you." Held, that confessions made under the influence exerted by this language could not be regarded as voluntary, and are inadmissible. *Newman v. State*, 173

2. *Same.*

Where an officer promised respondent, a girl of fourteen, that if she would tell, she should not be hurt, and she thereupon confessed her guilt, it was held that her confession was inadmissible, as not having been made voluntarily. *Earp v. State*, 171

3. *Same.*

Where a confession which is inadmissible, because not voluntarily made, is admitted without objection, it is nevertheless the duty of the court to exclude the confession from the consideration of the jury by his charge, if so requested. *Ibid.*

4. *Same.*

Where a prosecuting witness, who testifies to confessions made in the presence

of himself and the sheriff, testifies in a preliminary cross-examination that it is possible that something was said about its being better for the prisoner to make a full disclosure, it was *held*, that the confessions were inadmissible. *People v. Barrie*, 175

5. *Same.*

Before confessions made to one in authority can be received in evidence, it must appear affirmatively that they were made voluntarily. *Ibid.*

6. *Evidence obtained from defendant by force.*

A prisoner, arrested for larceny of growing corn, was compelled by the officer who arrested him to put his foot into a fresh track in the field where the corn was growing. It was *held* proper for the officer to testify as to the correspondence between the prisoner's foot and the track, and that the evidence should not be excluded, because obtained through fear or force. *State v. Graham*, 182

7. Confessions obtained through fear or hope are inadmissible, because the fear or hope may so influence the prisoner's mind as to induce him to make false statements. But if independent facts or circumstances are learned through fear, force or hope, evidence of the facts or circumstances is admissible, because the fear or hope operating on the prisoner's mind can have no tendency to distort them. *Ibid.*

8. *Same.*

On a trial for murder, the prosecution put on the stand a convict who had been confined in prison with the respondent. The convict testified that respondent had told him that he had killed a man whom his conversation identified as the murdered man, and that respondent was afraid he would be tried for it when he got out. *Held*, that a charge which referred to this evidence as tending to show a voluntary confession without inducement was not erroneous. *McCulloch v. State*, 317

9. *Silence as an admission.*

Silence under accusations is not always to be considered as an admission of their truth. And so, where the respondent had promised to be on his good behavior at a family interview to which he had induced a friend by means of such promise to accompany him, it was *held*, that his silence at that interview under harsh accusations should not be construed as an admission of their truth. *Slattery v. People* (and see note, page 32), 29

10. *Admissions, right to whole conversation.*

Where the prosecution have proved declarations of the respondent relative to the homicide by a witness who states that he did not hear all that respondent said at the time, the respondent has a right to prove by other witnesses who were present all that he said at the time tending to exonerate himself. *Coffman v. Commonwealth*, 293

11. *Same.*

On a trial for murder, where the prosecution have proved statements made by the respondent immediately after the killing, tending to show that he killed the deceased, the respondent has a right to have the whole conversation, including the explanation that he then made of the fact. *Burns v. State*, 323

12. *Extra-judicial statements by respondent.*

On a trial for felony, any statements which have been made by the respondent as to any fact circumstantially material to the issue are admissible against him. Accordingly, where it was material to show that respondent had ridden very fast, it was *held* competent to prove his previous statements as to the speed of his horse. *Frazer v. State*, 315

13. *Right to whole conversation.*

A witness called to prove confessions made by the respondent in a certain court.

versation, who testifies that "he could not remember all the conversation that took place; a great many things were said in the conversation that he did not remember," will not be allowed to testify to what he does remember. *Berry v. Commonwealth*, 272

14. A confession cannot be proved by a witness who does not remember the substance of all that was said in the same conversation. *Ibid.*

15. *Weight of admissions.*

Confessions deliberately made, and precisely identified, are often most satisfactory evidence; but mere verbal admissions, unsupported by other evidence, should be cautiously weighed, because of their liability to be misunderstood, the facility of fabricating them, and the difficulty of disproving them. *Burns v. State*, 323

## ADULTERY.

1. *Proof of marriage.*

Under an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with a single woman, the prosecution offered evidence tending to prove the marriage of the respondent in 1866. To avoid this marriage, the respondent testified in his own behalf that he had been married in 1864, to a woman who was still living, and from whom he had never been divorced: *Held*, that it was sufficient to maintain the allegation of the indictment, if the jury found either of these marriages to be a legal, subsisting marriage at the time of the cohabitation, and that the evidence as to both was properly submitted to the jury. *State v. Clark*, 34

2. *Proof of marriage in criminal cases.*

Evidence of a marriage in fact in a foreign jurisdiction is *prima facie* evidence of a valid marriage, and it is not necessary to prove the foreign law. *Ibid.*

3. *Indictment.*

Where an indictment charging the respondent, a married man, with adulterous and lascivious cohabitation with J., does not allege in express terms that J. is not his wife, but does allege that J. is a single woman, it sufficiently appears on a motion in arrest of judgment, that J. is not respondent's wife, and judgment will not be arrested. *Ibid.*

4. *Evidence of good faith.*

On the trial of an indictment for adultery, the respondents offered to prove that they acted in good faith under the advice of a justice of the peace, and honestly thought they were committing no offense. *Held*, that the evidence was properly excluded. *State v. Goodenow*, 42

## ALIBI.

A charge that "evidence of an *alibi* is evidence of a suspicious character," is error. *Line v. State*, 615

## ALIEN GRAND JUROR.

See GRAND JURY.

## ALTERNATIVE ERROR.

See ERROR.

## AMENDMENT.

- The prisoner was indicted for stealing nineteen shillings and sixpence. He was proved to have stolen a sovereign: *Held*, that by 14 and 15 Vic., ch. 100, sec. 1, the court at the trial had power to amend the indictment, if necessary, by substituting the word "money" for the words "nineteen and sixpence," and that by sec. 18, the indictment so amended was proved. *Queen v. Gumble*, 396

## ARRAIGNMENT AND PLEA.

1. It must affirmatively appear on the record that the respondent was arraigned and pleaded to the indictment. *Aylesworth v. People*, 604
2. *Record*.  
It must affirmatively appear by the record of a criminal case that there has been an arraignment and plea, or the verdict will be set aside by writ of error. *Grigg v. People*, 602
3. On the trial of an appealed criminal case, where the defendant was arraigned and pleaded before the justice, it is not necessary that there should be a new arraignment and plea in the appellate court. *Eisenman v. State*, 605
4. *Record*.  
Where it does not affirmatively appear from the record that defendant was arraigned and pleaded before trial, a conviction will be reversed on error, and this rule applies to cases of assault and battery. *Davis v. State*, 606
5. *Supplying plea after verdict*.  
After verdict the court has no power to have a plea entered *nunc pro tunc* for the defendant without his consent. *Ibid*.
6. Where there was no arraignment and plea, but the respondent, being present, announced himself ready for trial, and went to trial, without objection, the omission of the arraignment and plea will not avail the respondent on a motion for a new trial or in arrest of judgment. *State v. Cassidy*, 567

## ARREST.

- A peace officer may lawfully arrest, without a warrant, one whom he has reasonable cause to suspect of a felony, and it is not necessary for his justification to establish the guilt of the suspected person. *Dohring v. State*, 60

See HOMICIDE.

## ARSON.

See BURNING.

## ASSAULT.

1. *Pointing unloaded weapon*.  
On an indictment for an assault and battery, where the evidence showed that the respondent pointed an unloaded pistol at the prosecutor, at the distance of six paces, and ordered the prosecutor to kneel down, which he did through fear, it was *held* that this did not constitute an assault. *McKay v. State*, 46

2. *Intent.*

Under the Texas code, pointing an unloaded weapon, without any actual intent to do physical injury, is not an assault. In order to constitute an assault, there must be an actual intent to do a physical injury. *Ibid.*

3. *Ability to injure.*

Where there is no ability to inflict injury, and this is known to the respondent, he cannot entertain the intent to do injury. *Ibid.*

4. *Fear.*

Fear on the part of the prosecutor cannot constitute a threatening act an assault, when there is no intent or ability to do physical injury, even though such fear is reasonable under the circumstances. *Ibid.*

## ASSAULT AND BATTERY.

1. On the trial of an indictment for assault and battery, the evidence showed that the prosecutrix and the respondents were members of a society called Good Samaritans. The society had a ceremony of expulsion from the society. The prosecutrix becoming remiss in her duties, the respondents proceeded to perform the ceremony of expulsion, which consisted in suspending the prosecutrix from the wall by a cord fastened around her waist, the prosecutrix resisting: *Held*, that respondents were guilty of an assault and battery. *State v. Williams*, 56

2. *Recaption of stolen property.*

On the trial of an indictment for assault and battery, the respondent offered to prove that the assault and battery was committed in attempting to retake a horse which had been stolen from him a short time before, from a person in whose possession he found it. *Held* inadmissible, and that it would not excuse, justify, or mitigate the offense. A man has no right to retake stolen property by a breach of the peace. *Hendrix v. State*, 57

3. *Fighting by mutual agreement.*

On an indictment for assault and battery where the evidence was that the respondent and another, by mutual agreement, went out to fight one another in a retired place, and did fight in the presence of from fifty to one hundred persons, and that both were bruised in the fight, which continued until one of the parties declared himself satisfied, it was *held* that each was guilty of an assault and battery on the other. *Commonwealth v. Collberg*, 59

4. All fighting is unlawful, and it is of no consequence that it is by mutual agreement and without anger or malice on the part of those engaged in it. *Ibid.*

5. *Former conviction.*

On an indictment for an assault and battery, the respondent pleaded that he had been tried, convicted and fined for a breach of the peace, and that said conviction was for the identical facts charged in the indictment. On appeal from an order dismissing the indictment, the facts alleged in the plea being admitted to be true, it was *held*, that the plea was good, and the former conviction a bar to the prosecution of the indictment. *Commonwealth v. Hawkins*, 65

6. *Statute construed.*

A statute which punishes the inflicting of wounds by shooting or by cutting, thrusting or stabbing with a knife, dirk, sword or other deadly weapon, does not embrace striking and wounding with a pair of blacksmith tongs, and an indictment charging the latter was *held* to charge a simple assault and battery only. *Ibid.*

## ASSAULT WITH INTENT TO KILL AND MURDER.

1. *Written verdict construed.*

In a prosecution for assault with intent to murder, the jury brought in the following written verdict: "We find the prisoner, John D. Wright, guilty of assault with intent to kill William Wagner, as charged in the information; also, that the shooting done by Wright was done under great provocation, and we would recommend the prisoner to the mercy of the court." The judge, after reading the verdict aloud, said, "you find the prisoner guilty as charged in the information," to which the jury nodded assent; and the verdict so given was recorded as a general verdict of guilty, and the jury discharged. On these facts it was *held*, that the finding of the jury could not be construed as a finding that the prisoner was guilty of anything more than assault and battery, and that the entry of the general verdict of guilty in the record was unauthorized. *Wright v. People*, 244

2. *Sufficiency of evidence.*

On an indictment for assault with intent to murder, where the evidence showed a quarrel, in which the prosecutor struck the respondent in the face, the respondent then going to the house and coming out with two guns, and that the prosecutor then advanced towards the respondent with threatening gestures, taunting him to shoot, when the respondent shot, and that the prosecutor was a much more powerful man than the prisoner, it was *held*, that if death had ensued it would not have been murder, and the charge was not sustained. *Smith v. State*, 246

3. In assault with intent to murder, every ingredient of murder must be present, except death, and where if death had resulted, the offense would have been manslaughter and not murder, the charge is not made out. *Ibid.*4. *Intent.*

Where the evidence showed that the respondent shot at A. intending to kill him, but missed him and accidentally hit B., a by-stander, it was *held*, that he was not guilty of assault with intent to commit murder on B. *Barcus v. State*, 249

5. *Same.*

In assault with intent to murder, there must be an intent to kill the person assaulted. *Ibid.*

6. *Evidence.*

The evidence in this case held insufficient to justify a verdict of assault with intent to murder against two of the respondents. *Seborn v. State*, 597

7. *Verdict of assault with deadly weapon under indictment for assault with intent to murder.*

Where it appears on the face of an indictment for assault with intent to murder that the assault charged was committed with a deadly weapon, the respondent may be found guilty of an assault with a deadly weapon. *People v. Lightner*, 539

## ASSAULT AND BATTERY WITH INTENT TO COMMIT RAPE.

1. *Sufficiency of evidence to justify conviction.*

On an indictment for assault and battery with intent to commit rape, the evidence was substantially as follows: The prosecutrix, a white woman, having parted from a companion, started to go home alone through the woods. She heard the respondent, a negro, call out to her to "stop," and saw him running after her about seventy yards away. She began to run as

hard as she could, and was pursued by the respondent, who called to her to stop three times, and was catching up with her. He pursued her about a quarter of a mile through the woods, when, coming to the edge of the woods he saw a dwelling house near by, and turned back and ran off. It was *held*, that there was sufficient evidence of an assault; that there was sufficient evidence of the intent to commit rape. *KODMAN and BYNUM, JJ., dissenting. State v. Neely,* 636

## 2. Indictment.

On an indictment for an assault with an intent to ravish, which did not state that the act was done "unlawfully" or "feloniously," it was *held*, that the indictment was bad as to the intent to ravish, but good as an indictment for an assault and battery, and that a motion to quash was properly overruled. *Greer v. State,* 643

## 3. Two kinds of rape.

By statute, rape is divided into rape on females over the age of twelve years and under the age of twelve years, and evidence of a rape of the one class will not sustain a conviction for a rape of the other class. *Ibid.*

## 4. Variance.

Where the indictment does not state the age of the female, the court will intend that she was over twelve years of age, and evidence of a rape on a female under the age of twelve years will not sustain the indictment. *Ibid.*

## 5. The same rule applies to indictments for assault with intent to commit rape. *Ibid.*

## 6. Where an indictment for an assault with intent to commit rape does not state the age of the prosecutrix, evidence of an assault with intent to commit rape on her, she being a female under the age of twelve years, will not sustain a conviction. *Ibid.*

# ATTORNEY.

## Authority of attorney.

H. was arrested on Saturday night, by a policeman without a warrant, for a violation of a city ordinance. The policeman, after arresting him, took away his money, \$692. On Monday morning, H. was brought before the police magistrate, who took what was meant for a parol recognizance in the sum of \$300, to appear at two o'clock in the afternoon for trial. No bond was made, nor any entered in the magistrate's minutes. H. did not come at two. The policeman, under authority of H.'s attorney, paid the city attorney, for the city, \$300 of the money in his hands. On these facts it was *held*, that the attorney had no authority to consent to this use of his client's money, and that this disposition of it was unauthorized, and H., having sued the city for the \$300, was *held* entitled to recover. *City of Bloomington v. Heiland,* 600

# AUTREFOIS ACQUIT.

See FORMER JEOPARDY.

# AUTREFOIS CONVICT.

See FORMER JEOPARDY.



BASTARDY.

1. Bastardy is a penal proceeding, and has some of the characteristics of a civil action and some of a criminal prosecution. *Paulk v. State*, 67
2. *Imprisonment.*  
Imprisonment of the putative father for non-compliance with the judgment in a bastardy proceeding does not infringe the constitutional provision against imprisonment for debt. *Ibid.*
3. *Evidence.*  
In a bastardy proceeding, it seems that it is proper to show on behalf of the defendant that the child resembles a third person, who has had opportunity for illicit intercourse with the mother. *Ibid.*
4. *Same.*  
In a bastardy proceeding, evidence to show that the bastard resembled the children of a man who had been seen with the prosecutrix is inadmissible, being too remote and unsatisfactory. *Ibid.*
6. *Degree of proof.*  
Bastardy, though in form criminal, is in effect a civil proceeding and a preponderance of evidence is sufficient to justify a conviction. *People v. Christman*, 70
7. *Judgment.*  
A judgment for the payment of several instalments of money and the costs of prosecution and that the defendant "execute a proper and sufficient bond for the payment of the judgment herein in due form of law" is held not open to the objection that it requires the defendant to give a bond for the payment of the costs. *Ibid.*
8. *Sufficiency of evidence.*  
On a charge of bastardy which is supported only by the uncorroborated testimony of the prosecutrix, she being contradicted by three unimpeached witnesses, as to her having had sexual intercourse with others besides the defendant about the time the child was begotten, and where it appears that she had previously charged the paternity of the child on another man, the evidence is held too unsatisfactory to fix the paternity of the child on the defendant. *McCoy v. People*, 71

BETTING ON ELECTION.

See GAMING.

BIGAMY.

1. *Evidence of marriage.*  
In a prosecution for bigamy, evidence of the declarations of the respondent that a certain woman was his wife, and of the fact that he had lived with, recognized, introduced and represented her as his wife, is sufficient evidence of a marriage to submit to the jury. *Commonwealth v. Jackson*, 74
2. In a prosecution for bigamy, the first marriage may be proved by the admission of the respondent, in connection with recognition and cohabitation, but these are only facts tending to show an actual marriage, which must be found as a fact by the jury. *Ibid.*

3. *Void second marriage.*

It is no defense to a charge of bigamy that the second marriage was one between a negro and a white woman, which is prohibited and made void by statute; for every bigamous marriage is void. It is the entering into the void marriage while a prior valid marriage exists, that constitutes the gist of the offense; and it cannot help matters any that there are two elements of illegality in the case, instead of one. It is no valid reason for relieving a person from the consequences of violating one statute, that the act of doing so violated also another. *People v. Brown*, 72

## BURGLARY.

1. *Chimney.*

On an indictment for burglary, entering through the chimney of a cotton house is a breaking. *Walker v. State*, 362

2. *Dwelling house.*

If a part of a storehouse, communicating with the part used as a store, be slept in habitually by the owner or by one of his family, although he sleeps there to protect the premises, it is his dwelling house. If a person who sleeps in a part of a store house communicating with the part used as a store is not the owner, or one of his family or servants, but is employed to sleep there solely for the purpose of protecting the premises, he is only a watchman, and the store is not a dwelling house. *State v. Potts*, 363

3. *Evidence.*

Evidence that the respondent entered the prosecutor's house between twelve and one o'clock at night by raising a window of the room in which the prosecutor and his wife were sleeping, and, when discovered, went out through the window, there having been money and clothing in the room, is sufficient to sustain a conviction for burglary, although it does not appear that respondent stole anything. *Woodward v. State*, 366

4. *Intent.*

The intent with which a prisoner breaks and enters the dwelling house of another in the night time is a question of fact for the jury under all the facts and circumstances of the case. *Ibid.*

5. In a prosecution for burglary, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt that it was committed in the night time. *Waters v. State*, 3676. *Insufficient evidence.*

In a prosecution for burglary, where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within a period of about forty or forty-five minutes, one-half of which was day and one-half of which was night, the defendant should have the benefit of the doubt necessarily arising, and ought not to be convicted of a breaking in the night time. *Ibid.*

7. *Evidence.*

Evidence that on the morning of August 12th, the prosecutor discovered between daylight and sunrise that his house had been broken into; that the house was on a public street in a town, and that a dry goods box and chair had been placed beneath the window where the entry was effected, is sufficient evidence to be submitted to the jury that the breaking was in the night time. *State v. McDonald*, 368

## BURNING.

1. *Statute construed.*

In a statute which provides that "every person who shall set fire to any building, \* \* or to any other material with intent to cause any building to be burned, or shall, *by any other means*, attempt to cause any building to be burned," the words "by any other means" must be construed to mean by any other means of a like nature; and an attempt to cause a building to be burned by soliciting a third person to set fire to it, and furnishing him with the materials, is not within the statute. *COOLEY, J., dissenting. McDade v. People,* 81

2. *Burning jail to escape.*

A prisoner who burns a hole in the floor of the lock-up for the purpose of making his escape through the hole so made is not guilty of arson. *It seems*, that if he had set fire to the building intending to burn it up and make his escape in the confusion attendant on the burning of the building, he would be guilty of arson. *Delany v. State.* 86

3. *Burning insured property.*

In a prosecution for burning insured property with intent to defraud insurers, an actual valid insurance must be proved. *Meister v. People,* 91

4. *Evidence.*

In a prosecution for burning insured property, evidence that a month before the fire the defendant wanted a witness to burn the property is admissible. *Ibid.*

5. *Statute construed.*

Under a statute punishing those who burn insured property, and those who cause or procure it to be burned, the defendant who is charged with burning the property cannot be convicted on proof that he procured the building to be burned while he himself was absent. Burning and procuring to be burned are different offenses under the statute. *Ibid.*

## CHALLENGE.

See JURY.

## CHANGE OF VENUE.

See VENUE.

## CHARGE OF COURT.

1. *Charge assuming fact.*

A charge which assumes facts as proven is erroneous. *Berry v. Commonwealth,* 272

2. *Same.*

On a trial for murder, a charge that "if the jury find that the respondent struck the deceased with a piece of wood, which was likely to produce death when used as he did use it, and that deceased died, etc.," is erroneous in assuming as a fact that respondent used the piece of wood in a manner calculated to produce death. *Leiber v. Commonwealth,* 309

3. *Charge dealing with facts.*

A charge which enumerates the facts which the evidence tends to prove is erroneous. The charge should point out the facts necessary to be found, and then leave to the counsel to argue and the jury to determine whether or not the evidence proves these facts. *Coffman v. Commonwealth*, 293

4. *Presumption of innocence.*

It is error to refuse the charge that in a criminal case the defendant is presumed to be innocent, and before he can be convicted the state must prove his guilt beyond a reasonable doubt. *Line v. State*, 615

## CHASTE CHARACTER.

See ABDUCTION.

## CONFESSIONS.

See ADMISSIONS AND CONFESSIONS.

## CONSPIRACY.

1. *Consummation of fraud.*

On an indictment for conspiracy to defraud, it is not necessary to allege or prove that the fraud was successful. The act of conspiracy is an offense of itself, though the fraud be never consummated. *Isaacs v. The State*, 103

2. *Consummation of crime.*

It is not necessary to constitute the offense of conspiracy that any act should be done in pursuance of the conspiracy. *Landringham v. State*, 105

3. *Indictment.*

An indictment for conspiracy to commit robbery, which charges an intent to "forcibly and feloniously take from the person of A. B.," but does not charge that it was to be done "by violence," or "by putting in fear," is insufficient. *Ibid.*

## CONSTITUTIONAL LAW.

1. A statute validating all the ordinances of a city is obnoxious to a constitutional provision that no statute should embrace more than one subject matter. *Brieswick v. Mayor, etc., of Brunswick*, 559

2. A statute entitled "An act prohibiting the sale of spirituous or fermented liquors," etc., prohibited also the giving away of liquor on election days. The provision against giving was held not void or obnoxious to the constitutional provision that "every law shall embrace but one subject, and that shall be described in the title." *Cearfoss v. State*, 460

3. A proviso in a criminal statute against conspiracy, which reads as follows: "Provided that in any indictment under this section it shall not be necessary to charge the particular felony which it was the purpose \* \* to commit," is unconstitutional and void. *Landringham v. State*, 105

4. *Constitutional right.*

The respondent was charged, in an information for burglary and larceny, as a

principal. He was found guilty of being accessory before the fact to grand larceny. The statute permits an accessory to be charged and convicted as if he were a principal. *Held*, not in derogation of his constitutional right "to demand the nature and cause of the accusation against him," and that there was no error in the verdict. *State v. Cassidy*, 567

#### 5. Waiver of jury in misdemeanors.

On the trial of a criminal complaint for an assault and battery, before a justice of the peace, a defendant may waive his right to a jury, where he expressly so elects, and if he does so, a trial without a jury is not a violation of his constitutional right. *Ward v. People*, 565

### CONTEMPT.

#### 1. What is a contempt.

A newspaper article concerning a criminal case pending before the supreme court, which prophesies that the prisoner will get a new trial and eventually escape justice, because \$1,400 is enough nowadays to purchase immunity from the consequences of any crime, and that "the courts are now completely in the control of corrupt and mercenary shysters — the jackals of the legal profession — who feast and fatten on human blood, spilled by the hands of other men," is a contempt of court of flagrant character, and calculated to embarrass and obstruct the administration of justice. *Scott and Sheldon, JJ.*, dissenting. *People v. Wilson*, 358

#### 2. Constructive contempt.

Under a statute that "the said court shall have power to punish contempt offered by any person to it while sitting," the court has power to punish a constructive contempt committed by a newspaper article referring to a case then pending before the court. All acts calculated to impede, embarrass or obstruct the court in the administration of justice should be considered as done in the presence of the court. (And see note, p. 141.) *Ibid.*

#### 3. It seems that the court would have no right to punish any criticism on its decisions or official conduct in regard to cases that are ended, so long as its action is correctly stated and its official integrity is not impeached. *Ibid.*

#### 4. Responsibility of proprietor of newspaper.

The proprietor of a newspaper may be punished for contempt for an article published in the newspaper owned by him, although such article was published without his knowledge or consent, when on a rule to show cause why he should not be punished, he makes no defense as to matters of fact, except that he did not know or sanction it before publication. (And see note, p. 141.) *Ibid.*

#### 5. Responsibility of managing editor.

The managing editor of a newspaper may be punished for contempt, for permitting the publication of a newspaper article, which, although not written by him, was seen by him before publication, and which he had power to exclude from the paper. *Ibid.*

#### 6. Appearance by attorney.

On a rule to show cause why an attachment should not issue against the respondents for a contempt, if the respondents rely on an excuse only, they should appear in person. If they appear by attorney, and defend on legal grounds, an excuse can only be regarded in mitigation of punishment, and not as ground for discharging the rule. *Ibid.*

### CONTINUANCE.

#### 1. The defendant applied for a continuance when the case was called for trial, on the ground that the indictment was only found two days previously, and

his counsel had been so much engaged that he had not been able to prepare the case for trial. It being made to appear by the certificate of the trial judge, that the defendant had been arrested the term before, and was then fully informed of the charge against him, and was asked if he desired counsel, and wanted a trial, to both of which questions he answered no: *Held*, there was no error in overruling the motion for a continuance. *Shivers v. State*, 206

2. *Right to continuance for absence of witness.*

Respondent being arraigned on the 14th, his trial was set for the 18th. On the 14th he had his subpoena issued, but a material witness in his behalf could not be served, being temporarily absent. On these facts being shown to the court by affidavit, it was *held*, that a motion for a continuance should have been granted, and to refuse it was error. *Shirwin v. People*, 650

CORPUS DELICTI.

See HOMICIDE.

CROSS EXAMINATION.

See WITNESS.

CUMULATIVE SENTENCE.

See SENTENCE.

DANGEROUS WEAPON.

1. What is a dangerous weapon is a question of fact, and not of law, and the court has no right to instruct the jury, as matter of law, that a policeman's mace is a dangerous weapon. *Doehring v. State*, 60
2. What is a dangerous weapon is a question of fact and not of law. *Berry v. Commonwealth*, 272

DEATH FROM SURGICAL OPERATION.

See HOMICIDE.

DISORDERLY HOUSE.

See HOUSE OF ILL FAME.

DECEASED WITNESS. EVIDENCE OF ON FORMER TRIAL.

See EVIDENCE.

DISCRETION.

*Matter of discretion.*

Whether or not a co-respondent, indicted as an accessory, shall be first tried so that his testimony may be had for the defense on the trial of the principal,

is a matter in the discretion of the trial court, and the supreme court will not review the exercise of that discretion where there is no evidence that it has been abused. *State v. Underwood*, 351

See INDICTMENT. FORGERY.

## DUPLCITY.

See HOMICIDE.

## DUTY OF PROSECUTION IN CALLING WITNESSES.

See HOMICIDE.

## DYING DECLARATIONS.

See HOMICIDE.

## ELECTION.

See FORGERY. SEDUCTION.

## EMBEZZLEMENT.

### 1. Sufficiency of employment.

Under an indictment founded on the ordinary statute against embezzlement, evidence that the prosecutor gave the prisoner a watch which the prisoner, as agent for the prosecutor, was to trade for a wagon when he could find a suitable opportunity, and for which service the prosecutor was to pay the prisoner \$5.00, shows a sufficient employment to make the prisoner guilty of embezzlement, in converting the watch to his own use. *State v. Foster*, (and see note, p. 149), 146

### 2. Statute construed.

A statute against embezzlement from "any corporate body in this state" does not extend to or include foreign corporations doing business in the state without authority of law. *Cory v. State*, 166

### 3. Clerk or servant.

The prisoner was engaged by the prosecutors to solicit orders for them, and was to be paid by commission on the sums received through his means. He had no authority to receive money; but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders wherever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. Contrary to his duty he applied for payment of a certain sum; having received it, he applied it to his own use, and denied, when asked, that it had been paid to him: *Held*, on the above facts, that the prisoner was not a "clerk or servant" within the meaning of 24 and 25 Vic., ch. 96, sec. 68. *Queen v. Negus*, 150

### 4. Same.

The prisoner's father was clerk to a local board, and held other appointments. The prisoner lived with his father, and assisted him in his office, and in the business of the board. In his father's absence, the prisoner acted for him at the meetings of the board, and when present, he assisted him. The prisoner was not appointed or paid by the board; and there was no evidence that he received any salary from his father. The board having occasion to



raise a loan on mortgage, the prisoner managed the business for his father, and at his father's office received the money from the mortgagees, and appropriated a part of it to his own use: *Held*, that there was evidence that the prisoner was a clerk or servant to his father, or employed as clerk or servant, and was guilty of embezzlement from him. *Queen v. Foulkes*, 153

#### 5. Direction in writing.

The prisoner, a stock and share dealer, was employed by the prosecutrix to purchase securities for her. He bought in his own name, and received money from her from time to time to cover the amounts he had paid or had to pay for the securities. Such payments were not made against any particular item, but in cheques for round sums. On one occasion he wrote to her, "I inclose a contract note for 300l. J. bonds, at 112, 330l.," and the contract note ran, "Sold to Mrs. S. (the prosecutrix), 300l. J., at 112, 330l.," and was signed by the prisoner. The prosecutrix wrote in reply: "I have just received your note and contract note for three J. shares, and inclose a cheque for 330l. in payment." The prisoner never paid for the bonds, but in violation of good faith, appropriated to his own use the proceeds of the cheque: *Held*, that the letter of the prosecutrix was a direction in writing to apply the proceeds of the cheque to pay for the bonds, if they had still to be paid for, within the meaning of 24 and 25 Vic., ch. 96, sec. 75; and that the prisoner was rightly convicted of a misdemeanor under that section. *Queen v. Christian*, 157

See LARCENY.

### ERROR.

#### 1. Alternative error.

Where the record does not show whether inadmissible evidence which was objected to was admitted or not, but the court can see from the record that if such evidence was not admitted, there is nothing to sustain the verdict, the judgment and verdict will be set aside. If the objectionable evidence was admitted, that is error. If it was not, the verdict is erroneous because there is nothing to support it. In either case there is error. *Brown v. People*, 225

#### 2. Error must be injurious.

The record not disclosing what the respondent expected to prove by a witness, the court cannot reverse the judgment because the trial court excluded a legal question. For all that appears under such circumstances, the exclusion of the question may have been a benefit to the respondent. It must affirmatively appear by the record that an error complained of was injurious to the party. *Burns v. State*, 323

#### 3. Error that does not prejudice.

Where the jury finds the respondent guilty of murder in the first degree, under instructions properly defining murder in the first degree, it seems that respondent would not be prejudiced by an erroneous instruction as to murder in the second degree. *State v. Underwood*, 251

#### 4. Formal error cured by verdict.

Any error in this case in the summoning of the jury held cured by the statute of amendment. *Lynch v. Commonwealth*, 283

#### 5. Improper remark.

The court has no right to say in the presence of the jury that it was the duty of the prisoner to bring forward his defense on his preliminary examination. *Sullivan v. People*, 359

#### 6. Remark by court in presence of jury.

An improper remark by the court, adverse to the prisoner in the presence of

the jury, will be considered on writ of error as though it were a part of the charge. *Ibid.*

7. *Improper remark in presence of jury.*

An improper remark, prejudicial to the respondent, made by the court in ruling out testimony is error. *Shirwin v. People*, 650

8. *Error in request to charge.*

If there is any error in a request to charge, or if a request to charge in the disjunctive is asked, either branch of which is erroneous, the whole charge is properly refused. *State v. Cassidy*, 567

EVASION.

See LIQUOR SELLING.

EVIDENCE.

1. *Of incorporation.*

On the trial of an indictment for stealing from a corporation, evidence that a company known by the name given in the indictment is a corporation *de facto* doing business is sufficient evidence of incorporation. *People v. Barrie*, 178

2. *Transcripts of public records.*

Under a statute which provides that the certificate of any public officer of the state to any record, document, paper on file, or other matter or thing in his office, shall be admissible in evidence in any court of the state: *Held*, that such certificate is admissible against a defendant in a criminal case, and that his constitutional right to be confronted with the witnesses against him is not thereby violated. *Shivers v. State*, 208

3. *Evidence of deceased witness on former trial.*

The evidence of a deceased witness, given on the first trial of the respondent, is admissible against him on a second trial of the same indictment. *Kean v. Commonwealth* (and see note, p. 203), 199

4. *But the statement in a bill of exceptions of the testimony of a deceased witness, given on a former trial, is not admissible against the respondent on a second trial of the same indictment. The testimony of the deceased witness must be proved by persons who were present at the first trial. The respondent has a right to be confronted with the witnesses against him.* *Ibid.*

5. *Parol evidence of what the law requires to be reduced to writing.*

Where the law requires a committing magistrate to take the voluntary confession of the accused in writing, the writing is the best evidence of what statement he made on his examination, and without proof of the loss or destruction of the writing, it is not competent to prove by parol what the accused said on such examination. *Wright v. State*, 191

6. *Memorandum.*

Where a witness refers in his testimony to a memorandum as showing a fact involved in the issue, and states that he has such memorandum in his pocket, it is error for the court to refuse to compel the witness to produce the memorandum. *Daniel v. State* (and see note, p. 187), 187

7. *Conclusion of fact.*

It is not competent for a witness who has testified "that he slept in the same room with the prisoner the same night that the crime he is charged with was committed; that the witness was wakeful; that he saw the prisoner go to bed, and found him in bed the next morning when he woke up," to testify

further, that in his opinion the prisoner could not have gone out without his knowledge. This would be testifying to an inference of fact which it is the province of the jury to draw. *Bennett v. State*, 188

8. *Presumption of fact.*

There is no presumption of fact which is not entirely within the disposal of a jury in a criminal case. *Hamilton v. State*, 618

9. *Same.*

Intent may be inferred from the act, but there is no artificial rule of law which requires or allows a particular intent to be presumed from given facts, when the undisputed evidence shows that no such intent was in fact entertained. *Barcus v. State*, 249

10. *Statement of co-conspirator.*

A statement by one respondent made the day after the commission of the crime is not admissible against his co-respondent, although it has appeared that there was a conspiracy between them to commit the crime. *Hamilton v. State*, 618

11. It is error to allow a jury to infer a fact, of which there is no evidence. *Saunders v. People*, 346

12. *Insufficient evidence.*

Testimony which raises a mere conjecture ought not to be left to a jury as evidence of a fact which a party is required to prove. *State v. Carter*, 444

13. *Comparison of handwriting.*

Where, on the trial, the respondent admitted the genuineness of a certain letter, it was held that the jury might use it to compare with the handwriting of letters whose genuineness was disputed by the respondent, but to whose genuineness a witness testified. *State v. Clark*, 34

See ADMISSIONS AND CONFESSIONS.

## EXTRADITION.

1. *Fugitives from justice.*

The governor of the state has no authority to surrender a fugitive who has committed a crime in another state, unless judicial proceedings have been commenced against him for the crime in the state in which it was committed. *Ex parte John White*, 169

2. *Arrest of fugitives from justice.*

A person cannot be arrested here for a crime committed in another state, unless a prosecution has been commenced, and is pending against him for the alleged crime in the state having jurisdiction of the offense. *Ibid.*

3. *Constitutionality of law concerning fugitives from justice.*

The court say, without passing authoritatively on the point, that no reason is perceived why a law allowing fugitives from justice fleeing from another state to be arrested here and delivered up to the authorities of the state having jurisdiction of the offense, is not constitutional. *Ibid.*

## EXPERTS.

See HOMICIDE. SEDUCTION.

## FALSE PRETENSES.

1. On an indictment for false pretenses, in the sale of a horse, a pretense that the horse was sound, when the respondent knew that he was not, is a false pretense within the statute. *State v Stanley*, 209
2. *Indictment.*  
An indictment for false pretenses in selling a mortgage which alleges that the prisoner pretended that he had recently sold the real estate covered by the mortgage, and that said real estate was situated in I., but which does not give the name of the purchaser or describe the property, and does not allege that such name and description are unknown, is bad on a motion to quash as being too uncertain and indefinite. *Kellar v. State*, 211
3. *Same.*  
In an indictment for false pretenses in the sale of a \$500 mortgage, where the pretense was that the real estate covered by the mortgage was worth \$3,500, an allegation that the real estate was not worth \$3,500 is insufficient. The indictment should show that the property was not of sufficient value amply to secure the sum of \$500. *Ibid.*
4. *Intent to defraud.*  
It seems that, in a prosecution for false pretenses in the sale of a mortgage, if the real estate covered by the mortgage is sufficiently valuable amply to secure the sum due on the mortgage, it is immaterial that the respondent represented the real estate to be very much more valuable than it actually was. *Ibid.*
5. *Indictment.*  
In an indictment for false pretenses in the sale of a mortgage, where the pretense is that the property covered by the mortgage is not subject to any prior liens, an allegation that the property was subject to prior liens, but which does not set them out or describe them, is insufficient. *Ibid.*
6. *Future events.*  
Representations of future events are not false pretenses, which must be as to existing facts. *Ibid.*
7. *Indictment.*  
An indictment containing contradictory and repugnant allegations is bad. *Ibid.*
8. *Same.*  
The indictment in this case is held to allege facts sufficient to deceive a person of ordinary caution and prudence. *Jones v. State*, 218
9. *Property obtained.*  
Where a note was obtained by false pretenses, and a few hours afterwards the respondent induced the prosecutor to exchange that note for a second of the same tenor, because the first was written in pale ink, it was held that the evidence was sufficient to sustain the allegation of the indictment which charged the obtaining of the second note by means of the false pretenses, it being all one transaction. *Ibid.*
10. *False token.*  
A printed business card, such as is ordinarily used by business men, purporting to be the card of a manufacturing firm in C., which is not a genuine business card of such firm, but fraudulent, is a false token. *Ibid.*
11. *Indictment.*  
An indictment for false pretenses, which does not allege that the prosecutor relied on the false pretenses as true, is bad on a motion to quash. *Ibid.*

12. *Same.*

An indictment for false pretenses which does not set out the contract into which the prosecutor was induced to enter by means of the false pretenses, is bad on a motion to quash, because it does not show why or how the prosecutor was induced by means of the false pretenses to part with his property. *Ibid.*

13. *Same.*

An indictment for false pretenses which does not allege that the respondent "knowingly" made the false pretenses is bad on a motion in arrest of judgment. *Maranda v. State,* 225

## FEAR.

See ASSAULT.

## FORGERY.

1. *Letter of introduction.*

A letter of introduction directed "to any railroad superintendent," bespeaking courtesies toward the bearer, has no legal validity and affects no legal rights, and is not a subject of forgery. *Waterman v. People,* 225

2. *Imperfect instrument.*

An indictment charging respondent with forging a bank check payable to the order of — is bad on demurrer. A check not payable to bearer, or to the order of a named person, is so imperfect that it could not defraud anyone. *Williams v. State,* 227

3. *Indictment.*

An indictment for forgery, which does not allege who was intended to be defrauded by the forged instrument, is bad on demurrer. *Ibid.*

4. *Variance.*

An indictment for forging a note purported to set forth the note according to its tenor. The signature to the note, as stated in the indictment, was, Otha <sup>his</sup> × Carr. The note offered in evidence was signed Outha <sup>his</sup> × Carr. Held, <sup>mark.</sup> a fatal variance, and the note inadmissible. *Broen v. People,* 228

5. *Tenor.*

The word "tenor" binds the pleader to the strictest accuracy. *Ibid.*

6. *Election — discretion.*

On the trial of an indictment containing two counts, one of which alleges the forging of a draft and the other the uttering and publishing of the forged draft as true, it is not error for the court to refuse to require the prosecutor to elect on which count he will proceed to trial. This is a matter in the discretion of the trial court. *Miller v. State,* 239

7. *Presumption of forging from proof of uttering.*

The uttering and publishing of a forged instrument by the respondent raises no presumption of law that he committed the forgery. On a charge of forgery the uttering and publishing of the forged instrument are circumstances to be weighed by the jury in connection with the other evidence in the case. *Ibid.*

## FORMER JEOPARDY.

1. Where a prisoner has once been put on trial for manslaughter, before a jury impaneled and sworn, and witnesses have been examined, he has been put in jeopardy, and if the judge, without the consent of the respondent, discharges the jury without submitting the case to them, this is a bar to any further prosecution for the same act, and he cannot afterwards be tried on an indictment for murder for the same killing. *People v. Hunckeler*, 507
2. The respondent was indicted for larceny, and while being tried, a *nolle pros.* was entered on that indictment. He was then indicted for burglary in the same transaction, and to this indictment, pleaded his former jeopardy. *Held*, that the plea was good, and a bar to further prosecution. *Jones v. State*, 510
3. The unnecessary discharge of one juror against the objection of the respondent, on trial for felony, is a discharge of the whole jury, and a bar to further prosecution of the indictment. *O'Brian v. Commonwealth*, 520
4. *Discharge of jury in respondent's absence.*  
On a trial for murder, the jury, after being out thirty-two hours, were discharged in the absence of the respondent on account of their inability to agree. This, being specially pleaded on a second trial of the same indictment, was held a good plea and a bar to further prosecution. *State v. Wilson*, 529
5. *Same.*  
The respondent, having been tried for homicide, the jury, while the respondent was absent, confined in jail, returned a verdict of guilty of voluntary manslaughter. On motion of respondent the verdict was set aside. On being arraigned for a second trial, respondent pleaded specially his former jeopardy. *Held*, that the plea was good, and a bar to further prosecution. *Nolan v. State*, 532
6. When the defendant has been once legally put on trial, the jury sworn and evidence introduced, any unnecessary discharge of the jury without their having rendered a legal verdict, and without the respondent's consent, operates as an acquittal, and is a bar to a further prosecution for the same offense. *Ibid*
7. *Autrefois convict.*  
A special plea to an indictment of *autrefois convict* before a court which had no jurisdiction over the offense is bad. *Reich v. State*, 543
8. *Conviction of assault after acquittal of murder.*  
On an indictment for murder in the statutory form, charging merely that the prisoner feloniously, wilfully, and of his malice aforethought did kill and murder "the deceased, no conviction could be had of an assault, and consequently an acquittal on such an indictment is no bar to a prosecution for an assault for the same act. *Reg. v. Smith*, 511

See ASSAULT AND BATTERY. INCEST.

## FIGHTING.

See ASSAULT AND BATTERY.

## GAMING.

1. *Things of value.*

Chips and checks redeemable in money by the dealer at a gambling table are things of value, within the meaning of a statute against gaming. *Porter v. State*, 232

2. *Keeping gambling house.*

The owner of a billiard table which is used with his knowledge and consent for playing billiards, on an understanding between the players that the loser shall pay for the game, is guilty of keeping a gambling house. *State v. Book* (but see note, p. 237), 234

3. *Betting on election.*

Betting upon the result of an election is not gaming. *State v. Henderson*, 233

4. *Playing billiards.*

Under a statute which provides that to "play at any game for any sum of money, or other property of value" is gambling, playing at billiards where the loser pays for the game is gambling. *State v. Book*, 234

5. *Burden of proof.*

On the trial of an indictment for permitting a minor to play billiards without the consent of his parents or guardian, the burden of proof is on the state to show that the minor did not have the consent of his parents or guardian. *Conyers v. State*, 237

6. *Indictment.*

Under a statute which prohibits the keeper of a billiard table from allowing a minor to play on it, and inflicts a fine for each game allowed to be played, an indictment which does not allege that a game was played, or name the person with whom the minor played, or give any reason for not naming him, is bad, on a motion to quash. *Zook v. State*, 240

## GOOD FAITH.

See ADULTERY. GAMING. LIQUOR SELLING.

## GRAND JURY.

1. *Alien grand juror.*

A special plea to an indictment that one of the jurors who found it was an alien is a good plea. *Reich v. State*, 543

2. *Oath of witness before grand jury.*

A special plea to an indictment that the witnesses on whose evidence it was found were not properly sworn, which does not name the witnesses or specify the oath they took is bad. *Ibid.*

3. *Grand juror as witness.*

There is no rule of law which prohibits a grand juror giving evidence against a prisoner who is being tried on an indictment found by the grand jury of which the grand juror was a member. *State v. McDonald*, 363



## GUILTY KNOWLEDGE.

Guilty knowledge may be proved by circumstantial evidence as well as any other fact. *Meister v. People*, 91

## HABEAS CORPUS.

1. *Federal prisoner in state prison.*

A person who has been convicted of a crime against the United States by a federal court, and confined in the prison of the state with the consent of the state, is deemed to be in the custody of the federal authorities. *Ex parte Le Bur*, 241

2. *Release of federal prisoners by state courts.*

The courts or judges of the state have no authority to release a prisoner upon a *habeas corpus*, when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case. *Ibid*.

3. A writ of error to an order refusing a discharge on *habeas corpus* will not be dismissed, because when the argument is reached, the term of imprisonment which is set up in the return to the writ of *habeas corpus* has expired. Presuming the imprisonment to be at an end, because the sentence has expired, would be to take for granted the validity of the sentence which is the very matter in question. *Lark v. State*, 563

See SENTENCE.

As to discharging prisoner confined under an illegal sentence, by *habeas corpus*, see note, p. 557.

## HABIT, PROOF OF AS MEANS OF IDENTIFICATION.

See HOMICIDE.

## HOMICIDE.

1. *Murder in first degree.*

The facts in this case held sufficient to sustain a verdict of guilty of murder in the first degree. *McCue v. Commonwealth*, 263

2. *Degree of murder.*

The respondent pleaded guilty to an indictment for murder. In accordance with the statute, the trial court heard evidence of the circumstances of the case, and adjudged the respondent guilty of murder in the first degree. A request having been made for special findings, and for filing the testimony on which the findings were based, the record was removed to the supreme court by a writ of error, and the judgment of the trial court reversed, and the respondent adjudged guilty of murder in the second degree. *Jones v. Commonwealth*, 262

## 3. The respondent had taken to hard drinking on account of the continued adulteries of his wife. He had attempted suicide by taking laudanum, and although his life was saved, continued up to the time of the killing in a constant state of nervous excitement, drinking, and keeping laudanum about him. On the day of the homicide he was in a state of high nervous excitement, and acted like a crazy man. On the evening of the killing, he went to the house of the deceased, his wife's mother, between nine and ten o'clock.

He said he had come to settle the fuss. His mother-in-law told him to go. He stepped back. She picked up a stool, and said she would level him with it if he did not go. He said, "I'll level you now," and immediately pulled out a pistol and shot her. Previous to this he had been on good terms with her. *Held*, murder in the second degree, there not being sufficient evidence of premeditation and deliberation. *Ibid.*

4. *Presumption as to degree of murder.*

Where the evidence shows that respondent killed deceased with a gun loaded by powder and bullets, the law presumes the killing to be intentional, and it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant to show from the evidence in the case, to the reasonable satisfaction of the jury, that he is guilty of a less crime, or that he acted in self-defense. *State v. Underwood*, 251

5. In cases of homicide, if circumstances of wilfulness and deliberation are not proved, the law presumes the killing to be murder in the second degree only. *Ibid.*

6. *Same.*

On a trial for felonious homicide, no presumption arises from the killing, of an offense higher than murder in the second degree. *McCue v. Commonwealth*, 263

7. *Manslaughter.*

In a prosecution for homicide, where it appears that no weapon was used, but that death resulted from a blow or a kick not likely to cause death, the offense is manslaughter and not murder, although the assault be unlawful and malicious, unless the respondent did the act with intent to cause death or grievous bodily harm, or to perpetrate a felony, or some act involving all the wickedness of a felony. *Wellar v. People*, 276

8. *Resisting illegal arrest.*

On a trial for murder, where evidence was given by the respondents that the homicide was committed by the respondent in resisting an utterly unjustifiable and illegal arrest, attempted by the deceased who was a policeman, it was *held* that the offense was no more than manslaughter, and that the court erred in excluding this evidence from the consideration of the jury. *Rafferty v. People*, 287

9. *Warrant signed in blank.*

A warrant signed by a magistrate in blank and afterwards filled up by a police sergeant with whom it had been left has, although regular on its face, no legal force or validity whatever, but is an absolute nullity; and if an officer is killed in attempting to make any arrest under it, the offense is but manslaughter. *Scott, J. dissenting.* *Ibid.*

10. *Manslaughter.*

It is not necessary that respondent should be without fault in order to reduce the killing of deceased by a blow of the fist in a sudden quarrel to manslaughter. *Coffman v. Commonwealth*, 293

11. *Provocation.*

Where the prisoner, who lived with his sister, a married woman, went home late at night and, hearing a noise in his sister's room, became suspicious that something wrong was going on; and, after listening awhile, becoming convinced that his suspicions were well founded, took out his knife and opened it, broke open the door, and found his sister in the room in her night dress, and deceased in the bed, and, being greatly enraged, killed the adulterer, it was *held*, as a matter of law, that this was not such provocation as reduced the killing to manslaughter. *Lynch v. Commonwealth*, 293

12. *Same.*

*It seems that seeing a married sister in the act of adultery is not such provocation as to reduce the killing of the adulterer to manslaughter.* *Ibid.*

13. *Same.*

*It is error to charge a jury on a trial for murder that "to reduce a homicide upon provocation, it is essential that the fatal blow shall have been given immediately upon the provocation given; for if there be time sufficient for the passion to subside, and the person provoked kill the other, this will be murder and not manslaughter."* *Ferguson v. State,* 582

14. *Self defense.*

*One who seeks and brings on a difficulty cannot shield himself under the plea of self-defense, however imminent the danger in which he finds himself in the progress of an affray.* *State v. Underwood,* 251

15. *Same.*

*It seems that if respondent agreed to fight and did fight the deceased, and while fighting, something occurred to create a reasonable belief in the respondent that he was then in danger of death or great bodily harm from deceased, and if respondent then on account of such fear killed deceased with a knife, it is homicide in self-defense, and excusable.* *Berry v. Commonwealth,* 272

16. *Same.*

*In order to excuse a homicide on the ground of self-defense, it is not necessary that there should be immediate impending danger. If the respondent believed, and had reasonable ground to believe, that there was immediate impending danger, and he had no other apparent and safe means of escape, he had a right to strike, although in fact there was no danger.* *Coffman v. Commonwealth,* 293

17. *Violence in maintaining rights of property.*

*On a trial for homicide it appeared that at the time of the killing, the deceased was engaged in moving a line fence between himself and respondent. It appeared also that the fence had been built by and belonged to deceased, but that it had been built on respondent's land: Held, that respondent had no right to resort to violence to prevent deceased from removing the fence, and that evidence as to the respective rights of the parties to keep the fence where it was irrelevant and inadmissible.* *State v. Underwood,* 251

18. *Death from surgical operation.*

*In cases of homicide, if an operation is performed on the deceased, such as an ordinarily prudent and skillful surgeon to be procured in the neighborhood would deem necessary, and such operation is performed with ordinary skill, the respondent is responsible for the death, although the operation and not the wound made by him caused the death.* *Coffman v. Commonwealth,* 293

19. *In cases of homicide, if an operation is performed on the deceased such as would not be deemed necessary by such ordinarily prudent and skillful surgeon as can be procured in the neighborhood, or if it would have been deemed necessary but was not performed with ordinary skill, and death results from the operation and not from the injuries inflicted by the respondent, the respondent ought to be acquitted, even though the injuries inflicted by him might eventually have proved fatal.* *Ibid.*

20. *Corpus delicti.*

*On a trial for murder, it appeared that a skeleton had been found corresponding in sex, size and race with the man whom respondent was charged with killing: Held, that this was sufficient direct evidence of a corpus delicti, and sufficiently laid the foundation for proving the skeleton to be that of the murdered man by circumstantial evidence.* *McCulloch v. State,*

21. *Dying declarations.*

On a trial for murder, dying declarations of the deceased should be restricted to the act of killing and the circumstances immediately attending it, and forming part of the *res geste*, and it is error to allow them to be given in evidence as to distinct transactions from which the jury may infer malice on the part of the respondent toward the deceased. *Leiber v. Commonwealth*, 309

22. *Same.*

On the trial of respondent for manslaughter in attempting to procure an abortion, it was held that an exclamation by the deceased the day before she died, *i. e.* "Oh, Aleck, what have we done? I shall die," was not admissible as a dying declaration. *People v. Olmstead* (and see note, p. 309), 301

23. *Admissibility of photograph.*

On a trial for homicide, a photograph, clearly proven to be a photograph of the deceased, was shown to a witness, who testified, under objection, that it resembled the body found supposed to be that of the deceased. No evidence was given that the photograph was a good picture, or as to its resemblance to the deceased. The evidence was held properly admitted. *Udderzook v. Commonwealth*, 311

24. *Photograph.*

Courts will take judicial cognizance that photography produces correct likenesses, the production of the photograph being governed by the operation of natural laws. *Ibid.*

25. *Evidence of habit as proof of identity.*

For the purpose of identifying deceased with one, who at one time went under a different name, it is proper to prove that both were in the habit of becoming intoxicated. Personal habits are means of identification. *Ibid.*

26. *Evidence of motive.*

On a trial for felonious homicide, any evidence tending to show that the respondent was jealous of the deceased is admissible as tending to show a motive. *McCue v. Commonwealth*, 268

27. *Evidence of relation of prisoner and deceased.*

On a trial for homicide, it is proper to prove the relations in which the deceased and accused lived with one another. *Wellar v. State*, 276

28. *Evidence.*

On a trial for homicide, it is proper to prove the respective strength of the parties, but not by evidence of specific acts. *Ibid.*

29. *Same.*

On the trial of a prosecution for manslaughter in attempting to procure an abortion, it is competent to prove any facts tending to show of what the deceased died. *People v. Olmstead*, 301

30. *Expert.*

It is not proper to admit the opinion of a witness as to what a person died of, without showing in the first place that the witness had made a sufficient examination of the deceased, and had such knowledge or experience as would qualify her to give an opinion. *Ibid.*

31. *Evidence of motive.*

On a prosecution for murder, evidence that the responder's wife being dead, he cohabited illicitly with a step-daughter, and was anxious to marry her, and that deceased had taken the step-daughter to his house and refused to give her up, and that deceased had contested in a *habere corpus* case the right of respondent to get the step-daughter and other step-children back to his house, is admissible as tending to show a motive. *Frazer v. State*, 315

32. On a trial for murder, any evidence which tends to show a motive is material and admissible. *Ibid.*

33. On a trial of respondent for murdering a man who had broken up illicit intercourse between respondent and his step-daughter, and continued to prevent such intercourse, letters of respondent showing great anxiety to get possession of the step-daughter's person are admissible as tending to show motive. *Ibid.*

34. *Evidence, declarations of deceased admissible as res gestae.*

On a trial for murder, where it had appeared that the deceased had gone to find the respondent, and armed himself with a revolver and a knife, saying that he intended to have a settlement with the respondent, and that when the respondent came up, the deceased spoke to him, and the two walked off together and shortly afterwards the report of a pistol was heard, but there was no evidence of the circumstances immediately preceding the killing, after the two walked away together: It was held, that the respondent had a right to prove that the deceased had said when starting to find him, that he was going to kill him, and used these words: "When you hear from me, you will hear that him or me is dead." Such declarations are admissible under the circumstances, as a part of the *res gestae*. *Burns v. State*, 323

35. *Threats by deceased.*

On a trial for murder, threats made by the deceased against the respondent, which are not admissible as part of the *res gestae*, and which were not communicated to the respondent, are inadmissible in his behalf. *Ibid.*

36. *Reputation of deceased.*

On a trial for felonious homicide, where the defense is that the killing was done in self defense, it is competent to prove the general character of the deceased for violence, and his habit of carrying arms, where such evidence will tend to explain the actions or conduct of the deceased at the time of the killing, and the intent of the respondent. *Horbach v. State* (and see note, p. 343), 330

37. On a trial for felonious homicide, evidence of the general reputation of the deceased for violence, or of his habit of carrying dangerous weapons, is not admissible until some acts or conduct on the part of the deceased at the time of the killing have been proved, which such evidence will tend to illustrate or explain. *Ibid.*

38. Where there was evidence that at the time of the killing, the deceased grossly insulted the respondent a number of times without any provocation, and that when respondent asked him what he meant, he put his hand behind him as if to draw a pistol, when respondent shot him, it was held admissible to prove the general character of the deceased for violence, and that he was in the habit of carrying weapons. *Ibid.*

39. *Circumstantial evidence.*

In this case, the evidence is held sufficient to warrant the verdict of guilty. *Frazer v. State*, 315

40. *Duty of prosecution as to calling witnesses.*

In cases of homicide, it is the duty of the prosecution, ordinarily, to call and examine, on behalf of the people, all those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, whether such witnesses be favorable or unfavorable to the prosecution. *Weller v. People*, 276

41. *Duplicity.*

On a demurrer for duplicity to an indictment for murder, containing but one count, charging the murder of three persons, it was held that the count was bad as charging three offenses. *People v. Alibez*, 344

42. *Killing of several.*

The murder of three persons constitutes necessarily three offenses. (But see note, p. 346.) *Ibid.*

43. *Pleading under criminal statute.*

The respondent cannot be convicted of statutory manslaughter, in attempting to procure an abortion, on an information, charging him simply with manslaughter, which does not recite the facts which constitute the crime under the statute. *People v. Olmstead*, 301

## HOUSE OF ILL FAME.

1. *Pleading.*

In an information for letting a house for the purpose of prostitution, the statement of the locality of the house need not be more precise than in informations for burglary or arson. *Saunders v. People*, 348

2. *Evidence.*

In a prosecution for letting a house for the purpose of prostitution, it is admissible to prove the reputation of the lessee, and of the girls who were seen in the house. *Ibid.*

3. *Same.*

Testimony which shows that the lessee of a house and women who had been seen in the house were reputed prostitutes is not, of itself, sufficient to establish the fact that the house is kept or used as a house of prostitution. *Ibid.*

4. *Same.*

Evidence of the general reputation of a house is admissible for the purpose of establishing its character as a house of prostitution. Whether such evidence is sufficient standing alone to sustain a conviction, *quere*. *St. v. State*, 350

5. *Evidence of reputation.*

Under a statute making the keeping of a house of ill fame resorted to for lewdness a common nuisance, "house of ill fame" means the same thing as "bawdy house." And the gist of the offense being the use of the house for lewd purposes, and not its reputation, evidence of the reputation of the house is not admissible. *State v. Boardman*, 351

6. *Evidence.*

In a prosecution for keeping a house of ill fame, evidence of the reputation of the women who frequent the house, and the character of their acts and conversation in and about the house, is competent. *Ibid.*

7. In a prosecution for keeping a house of ill fame, the house must be proved to be a house of ill fame by facts, and not by fame. *Ibid.*

## HUSBAND AND WIFE.

1. A husband may be criminally punished for illegal sales of liquor made by his wife in his presence and with his knowledge. *Hensly v. State*, 4652. On the trial of a husband for an illegal sale of liquor by the wife in his presence and with his knowledge, evidence of former sales by the wife in his presence is admissible to illustrate the character of the sale in the case on trial. *Ibid.*

## IGNORANCE OF THE LAW.

Ignorance of the law is no excuse for crime. To constitute a crime there must be a criminal intent, but when an act is unlawful an intent to do that act,

having a full knowledge of the facts is a criminal intent without regard to the party's knowledge of the law or that the act is unlawful. *State v. Goodenoic*, 42

ILLEGAL ARREST.

See HOMICIDE.

IMPEACHMENT OF WITNESS.

See WITNESS.

INCEST.

1. *Indictment.*

Under the statute of Indiana against incest between step-son and step-mother, each must have knowledge of the relationship, and an indictment against the step-son which does not allege that the step-mother knew of the relationship is bad on a motion to quash. *Baumer v. State*, 354

2. *Acquittal of one.*

Incest is a joint offense, and if one of the parties has been tried and acquitted, this fact, if pleaded, is a bar to the prosecution of the other party for the same offense. *Ibid.*

INDICTMENT.

1. It is sufficient to charge an offense in the words of the act creating the offense, when the charge made in that form fully informs the defendant of the nature of the offense charged against him. *Cearfoss v. State*, 460

2. *Criminal pleading.*

The averments in criminal pleadings should be definite, clear and distinct. *Kellar v. State*, 211

3. *Time.*

Time in an information, where it is not matter of description, is immaterial and need not be proved as laid. *Saunders v. People*, 346

4. *Joinder of joint and several counts in same indictment.*

On the separate trial of one defendant on an information, some counts of which charged him jointly with the others, and some of which do not charge the offense jointly against all, the jury should not be allowed to consider any counts in which all are not jointly charged. *Hamilton v. People*, 618

5. *Motion to quash.*

A motion to quash a whole information because it contains some objectionable counts, will not prevail where there are some counts to which there is no legal objection. The motion to quash should specify the bad counts. *Ibid.*

6. A motion to quash an information on the ground of misjoinder counts is addressed to the discretion of the court, and is not reviewable on writ of error. *Ibid.*

7. *Conclusion of indictment.*

Where an offense is made of a higher nature by statute than it is at common law, the indictment must conclude against the statute, but where the punishment is the same, or less, it need not so conclude. *State v. McDonald*, 368

See ADULTERY. ASSAULT WITH INTENT TO COMMIT RAPE. FALSE PRETENSES. FORGERY. GAMING. HOMICIDE. INCEST. LIQUOR SELLING. PERJURY.



## INSANITY.

1. *Proof of insanity.*

Where insanity is relied on as a defense to a criminal charge, the burden of proof is on the respondent to establish his insanity at the time of the act; but such insanity may be established by a preponderance of testimony and is not required to be proved beyond a reasonable doubt. *People v. Wilson*, 358

2. *Same.*

Where insanity is relied on as a defense to a charge of murder, the defendant must satisfy the jury that he was insane at the time of the killing. A doubt as to his sanity is not sufficient. *Lynch v. Commonwealth*, 283

3. *Doubt of sanity.*

A charge that "if the jury have a reasonable doubt of the sanity of the prisoner at the time of the killing, they cannot convict" is properly refused. *Ortwein v. Commonwealth*,

4. *Proof of insanity.*

To justify an acquittal, in cases of homicide, on the ground of insanity, the evidence must be sufficient to satisfy the minds of the jury that the respondent was insane at the time of the killing. A doubt is not sufficient. *Ibid*,

5. *Evidence.*

Evidence that the respondent was insane "on the night of the third or the morning of the fourth of January," when this is all the evidence that he was ever insane, and where there had been evidence that he was never insane, has no tendency to prove that he was insane on the morning of the second of January. *Sullivan v. People*, 359

## INTENT.

See ADULTERY. ASSAULT WITH INTENT TO KILL AND MURDER. BURGLARY. EVIDENCE. IGNORANCE OF THE LAW. LARCENY.

## JUDGE.

*Disqualification of judge by relationship.*

A judge who is related to the prosecutor by marriage is not incompetent to sit on the trial of a criminal case. He is not related to a party. *Newman v. State*, 173

## JURISDICTION.

*Jurisdiction of acts in another state.*

Whether a person who in another state becomes accessory before the fact to a felony committed in Kansas can be punished under the Kansas statutes, having done himself no act within the state, *quere*. *State v. Cassidy*, 567

## JURY.

1. *Jury of thirteen.*

Where, by mistake, thirteen jurors are impaneled and render a verdict, the verdict will be set aside. *It seems* that, if the last juror sworn on a jury of thirteen could be pointed out before the jury retired, he might be dismissed and the trial proceed. *Bullard v. State*, 577

2. *Jury to take law from the court.*

On the trial of a criminal case, the jury are not judges of the law, but it is the duty of the jury to accept and act upon the law as given them by the court.  
*Hamilton v. People,* 618

3. *Polling jury.*

In a criminal case the respondent has a legal right to poll the jury at the proper time, and it is not within the discretionary power of the court to refuse it. The proper time to poll the jury is after the verdict has been announced.  
*Tilton v. State,* 564

4. *Peremptory challenge.*

Under the statute in Texas, after a juror has been accepted and impaneled, the right of peremptory challenge is gone. *Horbach v. State,* 330

5. *Examination of juror on voir dire.*

On a trial for an unlawful sale of intoxicating liquor, the respondent has a right to ask the jurors on their *voir dire*, to enable him to exercise his right of peremptory challenge, whether they are members of a temperance society or have contributed money in aid of liquor prosecutions. *Lavin v. People,* 578

6. *Allowing documentary evidences in jury room.*

There is no error in allowing a jury to take documents to the jury room, where they have been admitted in evidence and exhibited to the jury during the trial. *Udderzook v. Com.,* 311

7. *Strangers in jury room.*

After the jury had retired, two witnesses necessarily passed through the jury room to get down stairs, but without any communication with the jury: *Held*, no ground for setting aside the verdict. *State v. Underwood,* 251

8. *Affidavits of jurors to sustain verdict.*

The affidavits of jurors are receivable in support of their verdict to show that nothing improper occurred during their consultation. *Ibid.*

See CONSTITUTIONAL LAW.

LARCENY.

1. *What is larceny.*

An officer of a bank with which a note of the defendant had been left for collection called on the defendant with the note for payment. The defendant asked to be allowed to see the note, and on its being handed to him, walked out of the room with it, and secreted or destroyed it. In a prosecution against him for theft, it was *held*, on a motion of the defendant for a new trial, that the court below properly charged the jury that if the defendant obtained possession of the note with a felonious intent, the act was theft. *State v. Fenn* (and see notes, pp. 394, 403), 378

2. *Felonious intent.*

Also that the court properly charged that the intent to deprive the owner of his property, and to gain some advantage to himself, constituted a felonious intent. *Ibid.*

3. *Taking.*

The "taking" in theft need not necessarily be secret, and without the knowledge of the owner, but may be done openly, by deception, fraud or force. *Ibid.*

4. *Animus furandi.*

Fraudulently taking the personal property of another without his consent, with a felonious intent to deprive him wholly of his property, although the taker designs, himself, to make but a temporary use of the property, is sufficient evidence of the felonious intent required to constitute the crime of larceny. *State v. Davis*, 398

5. *Consent of owner.*

Where the evidence was that the owner of property, being informed by his agent who had charge of the property, that respondent wanted the agent to join him, respondent, in stealing it, and thereupon the owner told the agent to let the respondent take it, and in pursuance of this arrangement, the respondent came at night and the agent let him have the property, and respondent started off with it, it was held that there was no larceny. *Williams v. State*, 413

6. Although the owner of property may leave it exposed for the express purpose of trapping one whom he expects to steal it; yet, if he, through an agent, incite a person to take it, the taking is no larceny, for it is by his own consent and procurement. *Ibid.*

7. *Larceny by bailee.*

An indictment for larceny by a bailee must state the bailment accurately, and if it does not, there will be a fatal variance. *Carter v. State*, 446

8. *Simple larceny. Larceny from the person.*

Simple larceny and larceny from the person are distinct offenses, and where simple larceny is a greater crime than larceny from the person (as it is on the facts of this case), the respondent cannot be convicted of a simple larceny on evidence which establishes a larceny from the person. *King v. State*, 426

9. *Property outside of store.*

Stealing property hanging at and outside of a store door is but simple larceny, and is not larceny from a house. *Martinez v. State*, 420

10. *Larceny from house.*

Where a bale of cotton was stolen from an alley way outside of a warehouse and not in a warehouse, it was held that the defendant was guilty only of simple larceny. *Middleton v. State*, 422

11. A charge that "if the bale of cotton was in front of the warehouse, and under its control and protection, stealing it is the same offense as if the bale of cotton were actually within the walls of the warehouse," is error. *Ibid.*

12. *Asportation.*

On a trial for larceny from the person, it appeared that respondent put his hand into the prosecutor's pocket and took his pocketbook in his hand, drew it half way out of the pocket, when, being discovered, he let it go and ran off. Held, a sufficient asportation, and that respondent was guilty of larceny. *Flynn v. State*, 424

13. Throwing goods off a railway train in motion, with a felonious intent to appropriate them, is larceny. *Price v. State*, 423

14. *Larceny by finder of lost goods.*

If the finder of lost goods, at the time of taking them into his possession, knows, or has the reasonable means of knowing or ascertaining, who the owner is, but intends at the time to appropriate them to his own use, and deprive the owner of them, he may be found guilty of larceny. *Commonwealth v. Titus* (and see note, p. 418), 416

15. If the finder of lost goods has no felonious intent at the time of taking them into his possession, a subsequent conversion of them to his own use will not constitute larceny. *Ibid.*

16. *Evidence.*

On a prosecution for stealing a horse and carriage, evidence that respondent, a young man, passing along the street late at night, seeing the horse and carriage standing in front of the owner's house, got in and drove off, and that the horse and carriage were found abandoned in the road next day several miles from where they were taken, the horse much exhausted from driving, and that respondent gave no notice to the owner or to any one where they might be found, is sufficient to sustain a verdict of guilty. *State v. Davis*, 398

17. *Evidence of ownership.*

The note was payable to W. or order, and was by W. indorsed to H., and by H. indorsed in blank, and it had been left by H. at a bank for collection. The information described the note as the property of H. *Held* that the fact of its being indorsed by H. did not necessarily show that H. was not still the owner, and that the judge below, after instructing the jury that the note must have been delivered by W. to H. properly left it to them to say from all the evidence, whether W. had delivered the note to H., and whether H. was still the owner. *State v. Fenn*, 378

18. *Evidence of value.*

And *held* that the judge properly charged the jury that the state was bound to prove the note to be of some value, but that they were not limited to direct evidence on this point, but might consider any evidence from which the value might be inferred. *Ibid.*

19. *Description of note.*

The note was described in the information as "a certain promissory note dated November 6, 1872, signed by the defendant, for the payment to W. or order, of \$2,300 on the 1st of May, 1872, value received, a more full description of which is to the attorney for the state unknown." *Held* to be sufficiently described. *Ibid.*

20. *Variance.*

The note was in fact for \$2,300 and interest and all taxes. *Held* not to be a fatal variance, all that is required being such substantial accuracy as shall make the identity of the note unquestionable, and protect the accused from another prosecution for the same offense. *Ibid.*

21. And *held* that the defendant, who wrongfully took the note and destroyed it, should not be permitted to say that it was not described with the utmost particularity. *Ibid.*22. *Evidence.*

On a trial for larceny of a \$50-bill, evidence that the prisoner two months afterwards passed a similar bill, and asked the person to whom he paid it not to tell where he got it, is admissible. *State v. Bishop*, 394

23. *Same.*

On a trial for larceny, evidence that third persons in no way connected with the case, and against whom there is no proof, had opportunity to steal the money, is inadmissible. *Ibid.*

24. *Same.*

On a trial for larceny of a \$50-bill, where it appeared that the prisoner had passed a similar bill, evidence tending to show that he had no means but his labor, and could not have received it for his labor, is admissible. *Ibid.*

25. *Larceny by servant.*

The prisoner, being the agent of the American Express Company in the state of Illinois, received a sum of money which had been collected by them for a customer, and put it into their safe, but made no entry of its receipt in their

books, as it was his duty to do, and afterwards absconded with it to Canada, where he was arrested and tried under a statute against the bringing into Canada of property stolen in a foreign country. *Held*, that he was guilty of larceny, and was properly convicted. *Reg. v. Hennessy*, 403

26. *Recent possession.*

A charge that "the possession of stolen goods recently after they are stolen is a strong presumption of guilt," is not error. Possession of property recently stolen makes out a *prima facie* case of guilt, and throws upon the defendant the burden of explaining that possession. *State v. Cassidy*, 567

27. On a prosecution for larceny, evidence that the defendant offered to settle the case by paying the prosecutor the value of the stolen property, and that he offered the constable money if he could get clear, is admissible as testimony to show guilt. *Reg. v. Starr*, 438

28. The possession of stolen property, though not shown to be a recent possession, is *held*, in connection of other facts in this case, sufficient evidence to support a conviction of larceny. *Ibid.*

29. *Effect of recent possession.*

It is not error to refuse to charge that "possession of stolen goods, without other evidence of guilt, is not to be regarded as presumptive evidence of burglary," in a case where there was other evidence of guilt. *Prince v. State*, 545

30. *Effect of possession of stolen property.*

On a trial for burglary and larceny, where evidence was given that the respondent was found in possession of the watch and chain stolen, within forty hours after the burglary, it is error to charge that if the jury believes this fact, the law presumes that he is the thief and that he has stolen the watch and chain, and he is bound to explain satisfactorily how he came by the goods. *State v. Graves*, 429

31. The rule in North Carolina as to the effect of the possession of stolen property is this: "When goods are stolen, one found in possession so soon thereafter that he could not reasonably have got the possession unless he had stolen them himself, the law presumes he was the thief." *Ibid.*

32. *Effect of recent possession.*

A charge which instructs the jury that proof of the possession of part of the stolen goods four months after the commission of the crime, no reasonable explanation being given of the possession, should be regarded as raising a strong presumption of guilt, is erroneous. *State v. Walker*, 432

33. The rule is, that recent possession of stolen property, unaccounted for, is a strong presumption or *prima facie* evidence of guilt. *Ibid.*

34. *Recent possession question of fact.*

What is recent possession is a question of fact, to be submitted to the jury, except in those cases where the court, in favor of the prisoner, can say, as a matter of law, that possession is not recent. *Ibid.*

35. *Effect of recent possession.*

On a trial for larceny, the only evidence was, that respondent was found in possession of the stolen horse a few hours after it was stolen. *Held*, that the evidence was not sufficient to justify a conviction. *People v. Noriega*, 436

36. On a trial for larceny, evidence of the recent possession of stolen property is not of itself sufficient to justify a conviction. *WALLACE and MCKINSTRY, JJ.*, not expressing an opinion. *Ibid.*

37. *Evidence.*

Possession of a stolen pipe within a week or ten days after it was stolen, in

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connection with the other circumstances in this case, was held insufficient to warrant a verdict of guilty. *Galloway v. State*, 437

38. *Effect of recent possession.*

Possession of a stolen feather bed and some bed clothes, five months after they were stolen, is not such recent possession as of itself to raise a legal presumption that the party in possession is the thief. It is merely a circumstance to be submitted to the jury in connection with other evidence. *Yates v. State* (and generally as to the effect of recent possession of stolen property, in larceny and kindred offenses, see note, p. 574), 434

39. *Evidence.*

In a prosecution for larceny, the evidence must precisely identify the thing stolen. It is not sufficient to show that one of two things equally valuable was stolen. *State v. Collins*, 443

40. *Same.*

On a trial for larceny of money, evidence that the person, after the larceny, had money, in no way identified as part of that stolen, is immaterial. *State v. Carter*, 444

41. *Irrelevant evidence in larceny.*

In a prosecution for larceny, it is not relevant to prove that third parties who had an opportunity to commit the crime were of bad character, such third parties not being witnesses or charged with the crime or otherwise connected with the case. *Bennett v. State*, 188

LIQUOR SELLING.

1. *Sale of liquor by club to members.*

In a prosecution for selling liquor on Sunday, it appeared that defendant was an officer of a club which met on Sundays for literary and social purposes, and which was also a mutual benefit society, and that no persons but members were admitted to their meetings; that lager beer was purchased with the society's moneys, and that on Sundays the members who desired drank the beer, and each time they got a glass, paid five cents into the treasury, and that the defendant had no personal interest in the matter, but merely acted as an officer of the club: *Held*, that this was a sale of liquor by the club to its members, and that defendant was properly convicted, having been the agent who made the sale. *Marmont v. State*, 447

2. *Acts of hospitality.*

A statute prohibiting, among other things, the giving away of spirituous liquors on election days by any person, is held to extend to and include acts of hospitality in a private house. *Cearfoss v. State*, 460

3. *Regulating licensed taverns.*

A statute gave a municipal board power to "regulate" licensed taverns. Under the authority of the statute a by-law was passed which provided that during the time in which the sale of liquors was prohibited by the by-law, the bar-room should be closed and unoccupied except by the members of the keeper's family or his employees, and should have no light except the natural light of day. *Held*, that the by-law was unauthorized and void. *Reg. v. Belmont*, 457

4. "Regulate" in such statute means regulations in respect of the sale of spirituous liquors therein, the hours and time at which they may be sold or prohibited, and with reference to the accommodation of guests and in respect of gambling therein, and not allowing disorderly characters to frequent the premises. The statute does not contemplate that the private and domestic arrangements of the family should be interferred with. *Ibid.*

5. *Responsibility of employer for sale of liquor by servant.*

An employer is not criminally responsible for an illegal sale of liquor by his servant, made without his knowledge or consent, and in violation of positive instructions given by him in good faith. *Lathrope v. State*, 468

6. *Criminal responsibility of employer for unauthorized act of servant.*

Under a liquor statute which prohibits all sales of liquors by unlicensed persons, an employer is criminally responsible for all unlawful sales made by his agent. The agent has no license to sell to any one, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption must be deemed conclusive that the agent or servant acts within the scope of his authority in making the sale. *McCutcheon v. State*, 471

7. *Barkeeper.*

A barkeeper is within the meaning of a statute prohibiting any person who keeps liquor, from selling it to minors, whether he is owner or merely an employee. *Marshall v. State*, 482

8. *Evasion.*

The fact that defendant told persons to whom he sold liquor that they must not drink it on his premises is of no importance, if, under the circumstances, he must have known that they would drink it on his premises, and the evidence in this case is held sufficient to justify the conclusion that defendant was trying to evade the law. *Eisenman v. State*, 484

9. *Guilty knowledge.*

In a prosecution for an illegal sale of liquor to a minor, it is immaterial whether or not the defendant knew that the purchaser was a minor. *WALKER and McALLISTER, JJ., dissenting. McCutcheon v. People*, 471

10. *Good faith.*

On a prosecution for selling liquor to a minor, it is a good defense that the defendant was misled and imposed on, and that he honestly believed the minor to be over age. But the defendant must prove this beyond a reasonable doubt. *Marshall v. State*, 482

11. *Good faith in selling liquor to minor.*

A druggist selling liquor to a minor on a physician's prescription in good faith, that it is to be used for medicinal purposes, is guilty of no offense. He is as much shielded by the spirit of the act as if he were exempted from the penalty by express words. *Bull v. State*, 477

12. *Same.*

A druggist selling liquor to a minor on a physician's prescription in good faith that it is to be used for medicinal purposes, is guilty of no offense. He is as much shielded by the spirit of the act as if he were exempted from the penalty by express words. *State v. Wray*, 480

13. *Indictment.*

In a prosecution for an illegal sale of liquor to a minor, it is not necessary that the indictment should allege that the defendant knew that the purchaser was a minor. *McCutcheon v. People*, 471

14. *Same.*

In a prosecution for selling liquor to be drunk on the premises, it is not necessary to allege in the complaint, or to prove on the trial, that the liquor was drunk on the premises, or anywhere. *Eisenman v. State*, 484

15. *Same.*

A complaint for selling liquor on Sunday, which alleges the sale to have been "on or about the 2d day of November, 1873, the said day being Sunday,"



- is bad on a motion to quash, time being of the essence of the offense. *Ey-finger v. State*, 486
16. *Variance*.  
Under an indictment for a sale of liquor to A., proof of a sale to A. and B., jointly, will not justify a conviction. *Brown v. State*, 487
17. *Indictment*.  
In a prosecution for selling liquor to a person in the habit of getting intoxicated, the complaint must allege and the proof show that such person was in the habit of getting intoxicated at the time the sale was made to him. *Zeizer v. State*, 489
18. *Evidence*.  
Testimony that *A* bought liquor of *B*, is evidence that *B* sold liquor to *A*. *Hensley v. State*, 465
19. *Intoxicating quality a question of fact*.  
Whether ale or cider is an intoxicating liquor is a question of fact, and not of law. *State v. Biddle*, 490
20. *Intoxicating liquor*.  
Whether or not lager beer is intoxicating is a question of fact, and not of law. *BIDDLE, C. J.*, dissenting. *Lathrope v. State*, 496

See HUSBAND AND WIFE.

LOST GOODS.

See LARCENY.

MARRIAGE.

*What evidence is competent to prove in criminal cases.*

See ADULTERY. BIGAMY.

MEMORANDUM.

See EVIDENCE.

NAME OF INJURED PERSON.

See ASSAULT AND BATTERY.

NEWSPAPER.

See CONTEMPT.

NEW TRIAL.

1. *Motion for new trial*.

Affidavit of co-defendant, against whom there is strong evidence, is not sufficient on a motion for a new trial on the ground of newly discovered evidence. *Delany v State*, 86

2. *Newly discovered evidence.*

On the trial of an indictment for embezzlement, the state gave evidence that the watch embezzled was worth \$95.00. The prisoner gave no evidence on this point. After the trial, it was discovered that the watch was not worth over \$10 or \$15. No negligence appearing on the part of the prisoner or his counsel, it was *held* that a motion for a new trial on this ground was improperly overruled. *State v. Foster*, 146

3. *Surprise.*

Where the testimony of the principal witness for the prosecution on the trial varies materially from that given by her before the committing justice, who was unexpectedly absent from the trial, the prisoner is entitled to a new trial, on the ground of surprise. *Boxley v. Commonwealth*, 655

4. The fact that a defendant did not move for a new trial in the court below will not bar a new trial on the reversal of an erroneous conviction in the supreme court. *People v. Barric*, 178

## NOLLE PROSEQUI.

The power of entering a *nolle prosequi* belongs to the prosecuting officer who represents the government, and not to the court. *State v. Madigan*, 542

## PERJURY.

1. Perjury cannot be assigned on an oath administered by a judge of election who has not been himself sworn. *Biggerstaff v. Commonwealth*, 4972. *Amount of evidence required to sustain conviction.*

On a trial for perjury to justify a conviction on the evidence of one witness, it is not necessary that such witness should be corroborated by additional circumstances equivalent to the oath of a second witness. The evidence to sustain a conviction must be something more than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence. *State v. Heed*, 502

3. *Indictment.*

Where, in an indictment for perjury, it was alleged that the defendant, during a judicial proceeding, etc., had falsely sworn to certain statements, and then immediately followed an allegation that certain of such statements were untrue, and there was no allegation that the statements, thus alone denied to be true, had been material to the issue on trial, nor did they of themselves appear to have been material: *Held*, that the indictment was demurrable, and should have been quashed. *Hembree v. State*, 504

4. *Materiality of testimony.*

A person not only commits perjury by swearing falsely and corruptly as to the principal fact which is directly in issue, but also in swearing falsely and corruptly to a circumstance materially tending to establish or disprove such fact; and this is so without regard to the question whether such principal fact does or does not exist. It is as much perjury to establish the truth by false testimony as to maintain a falsehood by false evidence, and the fact that the former may lead to a correct decision is immaterial. *Com. v. Grant*, 500

## PERSONAL RECOGNIZANCE.

See RECOGNIZANCE.

## PHOTOGRAPHY.

See HOMICIDE.

## PLEA.

See ARRAIGNMENT AND PLEA.

## POLICEMAN.

It appearing that respondent was a policeman, the court will presume that he possesses the ordinary powers of a peace officer. *Doehring v. State*, 60

## POLLING JURY.

See JURY.

## PRACTICE.

1. *Presence of respondent in court.*

It is not necessary that respondent should be present in court during the argument of a motion for a new trial, if he is present when it is finally determined. *State v. Underwood*, 311

2. *Presence of respondent on trial for misdemeanor.*

On a trial for misdemeanor, it is not necessary that the respondent should be present in person and the trial may proceed in his absence. *City of Bloomington v. Heiland*, 600

3. *Transcript.*

The transcript of a count in an indictment before the supreme court apparently showing that the embezzlement was charged as done "with" instead of "without" the consent of the owner, the court must regard the count as fatally defective. *Cory v. State*, 166

4. *Fraudulently disposing of mortgaged property.*

Under an indictment for fraudulently disposing of mortgaged property, it is not admissible to allege in the indictment and prove on the trial a mistake in the description of the mortgaged property in the mortgage. *Barclay v. State*, 636

5. *Proceedings on appeal after prisoner's escape.*

When the prisoner has escaped and remains at large while appeal proceedings are pending, the court will, on motion of prosecution, dismiss the appeal. *Wilson v. Commonwealth*, 612

6. *Same.*

When the prisoner has escaped and remains at large while appeal proceedings are pending, the court will, on motion of the prosecution, dismiss the appeal, but not until a reasonable time has elapsed for the capture or surrender of the prisoner. *Moore v. State*, 613

7. *Discharging jury on Sunday.*

The court may adjudicate on Sunday that a jury cannot agree, and then discharge them. *People v. Lightner*, 539

8. *Recharging jury in absence of counsel for respondent.*

After the jury have been charged and retired, it is error for the court to recall and recharge the jury in the absence of the counsel for the respondent, without his consent. It is an infringement of the constitutional right of the respondent to have the privilege and benefit of counsel. *Martin v. State*, 586

9. *Erroneous joint verdict.*

Where there is a joint verdict and judgment against several, which is erroneous as to one, against whom there was no evidence, the judgment must be reversed as to all. A *nolle prosequi* should have been entered as to the one against whom there was no evidence, or a verdict of acquittal rendered in his favor. *Isanes v. State*, 103

10. *Verdict as to three set aside as to two.*

A joint verdict as to three, erroneous as to two, against whom there is not sufficient evidence, may be set aside as to those two, and allowed to stand as to the third, against whom the evidence is sufficient to sustain the verdict. *Seborn v. State*, 597

## PRELIMINARY EXAMINATION.

1. *Irregularity of preliminary examination.*

A plea in abatement to an information, filed by a prosecuting attorney and based upon the return made to the circuit by a committing magistrate, which alleges that a part of the examination was had on a legal holiday, is bad. *Hamilton v. People*, 613

2. A preliminary examination for the purpose of holding to bail is not a judicial proceeding, and mere irregularities do not vitiate it. *Ibid.*

## PRESUMPTIONS.

See EVIDENCE. FORGERY. HOMICIDE.

## PROSECUTING OFFICER.

1. On a criminal trial for homicide, it is error for the court to allow counsel for the prosecution in addressing the jury to comment on the frequency of that crime in the community, and say to the jury that it is due to the lax administration of the law, and urge them to make an example of the respondent. *Ferguson v. State*, 582

2. It is error for the court to allow a prosecuting officer to use this language in addressing the jury: "The defendant was such a scoundrel that he was compelled to move his trial from Jones county to a county where he was not known." *State v. Smith*, 580

3. It is error for the court to allow a prosecuting officer to use this language in addressing the jury: "The bold and brazen-faced rascal had the impudence to write me a note yesterday, begging me not prosecute him, and threatening me if I did, he would get the legislature to impeach me." *Ibid.*

4. It is the duty of the court to protect the prisoner from unreasonable and unfair statements and arguments. *Ibid.*

5. *Corrupt agreement.*

An agreement with a prosecuting officer that if respondent will plead guilty to an information, respondent shall not be prosecuted on another information then pending for a like offense, is a corrupt agreement, and entitles the respondent to no indulgence or relief. *Golden v. State*, 586

6. *Prosecution by private counsel.*

Counsel employed and paid by private parties will not be allowed to prosecute in a criminal case, against the objection of the respondent, especially where the private party has a pecuniary interest in the conviction of the accused. *Meister v. People* (and see note, p. 102), 91

7. *Preliminary Examination.*

Preliminary examinations on charges of felony may be conducted by counsel employed and paid by private parties. *Ibid.*

PROSTITUTION.

See ABDUCTION.

PROVOCATION.

See HOMICIDE.

PUBLIC RECORDS AND DOCUMENTS.

See EVIDENCE.

RAPE.

1. *Evidence of previous acts of illicit intercourse with prosecutrix.*

On a trial for rape, where the prosecutrix testified that at the time of the act, she was unconscious and did not know whether defendant had ravished her, and a physician who examined her had been allowed to testify that somebody had had sexual intercourse with her, it was *held*, that the respondent had a right to prove previous particular acts of sexual intercourse between the prosecutrix and others. *Shirwin v. People*, 650

2. *Sufficiency of evidence.*

The evidence set forth in the opinion in this case was *held*, insufficient to sustain a conviction for rape. *Boxley v. Commonwealth*, 655

3. *Withdrawal of consent once given by prosecutrix.*

On the trial of a man for rape on his step-daughter, a girl twelve years of age, and small of her age, it was *held*, that a charge that "if the girl, in the first instance consented to the sexual intercourse with the respondent, but if after the commencement of the sexual intercourse she withdrew her consent, and the respondent forcibly continued it with knowledge of her dissent, this would be rape," was proper, and not error under the circumstances of the case. *State v. Niles* (and see notes, pp. 649, 660), 646

4. *Complaint.*

A complaint by the prosecutrix made two months after the commission of a rape is admissible against the respondent on a trial for rape. *Ibid.*

5. *Particulars of complaint not admissible.*

On a trial for rape the prosecution may give in evidence the fact that the prosecutrix made her complaint charging that the offense was committed, but it is error to admit the particulars of the charge or the name of the person charged by her. *Ibid.*

See ASSAULT WITH INTENT TO COMMIT RAPE.

## REASONABLE DOUBT.

It is the duty of the court when charging the jury that they must be satisfied beyond a reasonable doubt of the respondent's guilt to explain what is a reasonable doubt. *State v. Heed*, 502

## RECAPTION OF STOLEN PROPERTY BY FORCE.

See ASSAULT AND BATTERY.

## RECENT POSSESSION OF STOLEN PROPERTY.

See BURGLARY. LARCENY.

## RECOGNIZANCE.

*Parol recognizance.*

A parol promise to appear before a public magistrate has no legal validity or binding force. *City of Bloomington v. Heiland*, 600

## RECORD.

1. It must affirmatively appear on the record that an indictment was returned into court. *Aylesworth v. People*, 604
2. Where the record does not show affirmatively that before sentence was pronounced the respondent was asked if he had anything to say why sentence should not be passed upon him, sentence will be reversed and the prisoner remanded to be sentenced afresh, but the verdict is not affected. *McCue v. Commonwealth*, 268
3. Judgment will be reversed when the record does not affirmatively show that the respondent was present throughout the trial, and when the verdict was rendered. *Stubbs v. State*, 608

See ARRAIGNMENT AND PLEA.

## ROBBERY.

*Evidence—Res gestæ.*

On a trial for robbery, where the prosecutor swore to having been knocked down and robbed, it is competent to prove by witnesses who came up immediately, that he then told them he had been robbed. Such a statement is a part of the *res gestæ*. *Lambert v. People*, 000

## REPUTATION OF DECEASED.

See HOMICIDE.

## SEDUCTION.

1. *What is seduction.*

To constitute the crime of seduction, the woman must, relying upon some sufficient promise or inducement, be drawn aside from the path of virtue she was

honestly pursuing at the time the offense charged was committed. When the evidence showed that the parties had illicit intercourse whenever opportunity offered, a promise of marriage at any such acts would not make the act seduction. *People v. Clark* (and see note, p. 667), 660

2. *Prior acts of illicit intercourse by prosecutrix.*

On the trial of an information for seduction, the chastity of the female at the time of the alleged seduction is involved, and the defendant has a right to ask her, on cross-examination, whether, prior to the alleged seduction, she had had illicit intercourse with another. *Ibid.*

3. *Attempt to entrap respondent into marriage.*

On the trial of an information for seduction, it is competent for the defense to give evidence to show a plan between the female, her father and mother, to inveigle the defendant into a marriage, and failing, to prosecute him. *Ibid.*

4. *Expert testimony.*

It is proper to prove by medical experts that acts of sexual intercourse which have been testified to, were, owing to the situation of the parties, i. e., in a buggy, and the pain which would have resulted, highly improbable, if not impossible. *Ibid.*

5. *Election.*

On the trial of an information for seduction containing three counts covering three distinct transactions, the prosecutor will not be allowed to go to the jury on more than one act, and having introduced evidence tending to prove one of the acts charged, this will be treated as an election and thereafter no evidence as to the other acts charged is admissible. *Ibid.*

6. *Irrelevant evidence.*

On a trial for seduction, evidence of illicit intercourse between the parties subsequent to the alleged seduction is irrelevant and inadmissible. *Ibid.*

SELF DEFENSE.

See HOMICIDE.

SENTENCE.

1. *Cumulative sentence.*

Except by virtue of some statutory provision, every sentence must begin to run from its date, and its running cannot be postponed until the termination of a former sentence. *Prince v. State*, 545

2. *Suspended sentence — Sentence by a judge who did not try the cause.*

Where upon a plea of guilty to a charge of malicious injury to a dwelling, sentence has been suspended until the next term, and the prisoner allowed to go on his own recognizance in a merely nominal sum, and the subsequent term has passed without any further steps being taken, it is not competent for another judge holding the court temporarily to impose a severe sentence upon the respondent; such action is to be considered not merely as supplying the trial judge's omissions, but is practically overruling his decision. *Weaver v. People*, 552

3. *Erroneous sentence.*

Where a prisoner, who is confined under an illegal sentence, is brought before the court on *habeas corpus*, he must be discharged, and the court has no power to correct the sentence or to remand the prisoner to the trial court to be sentenced afresh. *State v. Gray*, 554



4. *Imprisonment in default of fine.*

Power to punish by fine or imprisonment does not include power to imprison in default of payment of a fine. *Brieswick v. Mayor, etc., of Brunswick*, 559

## SILENCE AS AN ADMISSION.

See ADMISSIONS AND CONFESSIONS.

## STATUTES CONSTRUED.

See ABORTION. ASSAULT AND BATTERY. BURNING. EMBEZZLEMENT. LIQUOR SELLING.

## STATUTORY CONSTRUCTION.

1. Although it is generally true that where the legislature adopts substantially the statute of another state, it is presumed to adopt also the construction previously given to it by the courts of that state; yet the legislature will not be presumed to have adopted such construction where such construction is inconsistent with the spirit and policy of the laws of the state adopting the statute. *McCutecheon v. People*, 471
2. Statutes are to be interpreted according to their natural and obvious meaning, and where there is no ambiguity in the language and its meaning and purpose are clear, courts are not authorized either to limit or extend the language of the act by construction. *Cearfoss v. State*, 460

## STEP-FATHER.

See ASSAULT AND BATTERY.

## SURPRISE.

See NEW TRIAL.

## SUSPENDED SENTENCE.

See SENTENCE.

## SUSTAINING IMPEACHED WITNESS.

See WITNESS.

## TENOR.

See FORGERY.

## VARIANCE.

See ASSAULT WITH INTENT TO COMMIT RAPE. FORGERY. LARCENY. LIQUOR SELLING.

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of Brunswick, 559

## VENUE.

1. *Change of venue; statute construed.*

Under a statute regulating changes of venue, one section provides that no second change of venue shall be had. Another section provides that a change of venue shall be had when the judge has been of counsel in the cause. Where in a change of venue the cause was removed to a circuit where the judge had been of counsel in the cause, it was held that a second change of venue was properly had, notwithstanding the provision of the section first mentioned. *State v. Underwood*, 251

2. *Same.*

A defendant can have but one change of venue for the same cause in the same case, and when he has had the case removed from one judge on the ground of bias and prejudice on the part of such judge, he cannot have it removed from another judge on the same ground. *Line v. State*, 615

## EMBEZZLEMENT.

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## VERDICT.

1. On a general verdict of guilty, on an indictment containing two counts for different offenses, based on the same transaction, the law applies the verdict to the count charging the higher offense. *Estes v. State*, 5962. *Correcting illegal verdict.*

If the jury tender an illegal verdict, the court, before it is recorded, has a right to direct their attention to it, and have them render a verdict responsive to the issue. *State v. Bishop*, 594

3. *Refusing illegal verdict.*

It is not error to refuse to record an illegal verdict, and to direct the jury to retire again and bring in a verdict in accordance with the charge of the court. *McCoy v. State*, 589

4. *Illegal verdict.*

Under an indictment against respondent, charging him as principal, a verdict of guilty as accessory after the fact is illegal. *Ibid.*

See PRACTICE.

## WAIVER.

1. Asking time to plead is equivalent to pleading in waiving defects in the arraignment. *People v. Lightner*, 5392. *Objection not made at trial.*

The court will not consider on appeal an objection, not raised on the trial, that the name of a corporation was not proven according to the fact. *Price v. State*, 423

## WAREHOUSE.

A building roofed over, of which one side and one end are planked up, the other side and end being left open so that wagons could drive under, used for storing cotton, and being enclosed, together with about two acres of land, by a tight plank fence, nine feet high, the gates of which are kept locked, is a warehouse. *Bennett v. State*, 188

LARCENY. LIQUOR

## WARRANT SIGNED IN BLANK.

See HOMICIDE.

## WITNESS.

1. *Capacity of child as witness.*

A girl whom the court by inspection determined to be between nine and ten years old, being offered as a witness, was objected to. Being examined as to her qualifications, she appeared very nervous and frightened, and said she could not tell her age, and did not know the nature or obligation of an oath, or what the consequences would be of swearing falsely. On a re-examination she said she was the daughter of the respondent, knew her prayers, could read some, believed in God, and thought it wrong to tell lies; *Held*, that she was properly received as a witness. *State v. Scanlan*, 185

2. *Competency of witness.*

The question of the competency of a witness is a question of fact, to be determined by the trial judge by personal inspection and oral examination, and his decision is not subject to revision. *Ibid.*

3. *Impeachment.*

In impeaching the character of a witness, evidence of the bad repute of his family or associates is irrelevant and inadmissible. *Kean v. Commonwealth*, 199

4. *Impeaching question.*

It is proper to ask a sustaining witness on cross-examination, whether he had said he would not believe the impeached witness under oath. *Hamilton v. State*, 613

5. It is proper to ask an impeaching witness who has testified to the bad reputation of an impeached witness for truth and veracity, whether from that reputation he would believe the impeached witness under oath. *Ibid.*

6. *Sustaining impeached witness.*

It is not competent to sustain the credit of a witness, who has been impeached by proof that he had made different statements, of the circumstances testified to by him on the trial, by evidence of his general reputation for truth and veracity. *People v. Olmstead*, 301

7. *Same.*

When the character of a witness has been attacked by evidence that he has been convicted of felony, it may be sustained by evidence of his general reputation for truth and integrity. *People v. Amancus*, 197

8. *Cross-examination.*

The respondent has a right on cross-examination of a witness for the prosecutor to draw out from him evidence which tends to contradict material evidence which has been given by another witness for the prosecution. *Hamilton v. State*, 613

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to introduce material evidence  
in rebuttal. *Hamilton v.*  
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